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No. 896

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

TRANSCRIPT OF RECORD.

THE UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

THE HONOLULU PLANTATION COMPANY (a Corporation),
Defendant in Error.

VOL. III.

(Pages 608 to 875, Inclusive.)

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Upon Writ of Error to the United States District Court, for the District of Hawaii.

THE FILMER BROS. CO. PRINT, 424 SANSOME ST., S.

verdict, and thereafter came into court and rendered and returned the following verdict, to wit:

"United States of America,
District of Hawaii.

In the District Court of the United States, in and for the District of Hawaii.

THE UNITED STATES OF AMERICA,
Plaintiff and Petitioner,
vs.
THE HONOLULU PLANTATION COMPANY (a Corporation) et al.,
Defendant and Respondent.

Verdict.

We, the jury in the above-entitled action, upon the issues framed in said action between the above-named plaintiff and petitioner, and the Honolulu Plantation Company, a corporation, defendant and respondent above named, find the following verdict, to wit:

1. We find that the above-named plaintiff and petitioner is entitled to have all the right, title, interest and estate of said The Honolulu Plantation Company, a corporation, said defendant and respondent, in and to the tract and parcel of land involved herein, and hereinafter more particularly described, condemned for the use and purposes set out in the petition on file herein, and to take, hold and acquire said tract and parcel of land and its appurtenances in fee simple absolute, for the public uses and purposes in said petition set out.

2. We find the value of all improvements on the property condemned in the above-entitled action to be eight thousand five hundred and twenty-three dollars.

3. We find the value of the property condemned in the above-entitled action, to wit, the leasehold interest of said defendant, said the Honolulu Plantation Company, a corporation, in and to the tract and parcel of land condemned herein, and hereinafter more particularly described, to be ninety-four thousand dollars, in United States gold coin.

4. As to that part of the property condemned herein which constitutes only a portion of a larger tract, we find and assess the damages which will accrue to the portion not sought to be condemned by reason of its severance from the portion sought to be condemned, and the construction of the improvements in the manner proposed by the above-named plaintiff and petitioner, to be nothing.

5. As to that part of the property condemned herein which constitutes only a portion of a larger tract, we find and assess the benefits to the portion not sought to be condemned by the construction of the improvements proposed by said plaintiff and petitioner, to be nothing.

The tract and parcel of land hereinabove in this verdict referred to is situated as follows, to wit:

In the District of Ewa, in and about the harbor of Pearl Lochs, sometimes called Pearl Harbor, in the Island of Oahu, in the Territory and District of Hawaii, in the United States of America, and is bounded and particularly described as follows, to wit:

Beginning at a point on the mauka or east side of the

right of way of the Oahu Land and Railway Company's Railroad, east, magnetic, from the corner of that certain fish pond dam situate near the north end of Kuahua Island.

1. Thence east magnetic 780 feet to a point.

2. Thence south 22 30′ E. magnetic 2804 feet to a point.

3. Thence south 47 31½′ W. magnetic 3333 feet to a point.

4. Thence south 69 04′ W. magnetic 6370 feet to a point.

5. Thence north 43 42 1-3′ W. magnetic 2686.6 feet to a point on the shore line.

Thence following the shore line to the eastward and southward to the point where the railroad first meets the shore line, Ewa, or west, of Puuloa station; thence following the mauka or east side of said right of way of said railroad with all its tangents and curves to the point of beginning (saving and excepting the right of way of said railway situate and lying between where course 3 above noted crosses said right of way about 700 feet northward of course 3, which section of right of way is not included in this tract), containing 561.2 acres, more or less.

Dated Honolulu, Hawaii, March 11, 1902.

A. BARNES,

Foreman of said Jury."

And to said verdict said plaintiff and petitioner, through its said counsel then and there present, then and there duly excepted upon the following grounds, to wit:

1. That said verdict is excessive, in this, that it at-

tempts to award excessive, unreasonable and inconsistent compensation.

2. That said verdict is contrary to and against the law and the evidence herein.

3. That said verdict is not sustained or justified by either the law or the evidence herein, or the weight of the evidence herein, and that said evidence is insufficient to justify said verdict.

4. That said verdict is contrary to and against the charge of the Court herein. (Exception No. 47.)

And said plaintiff and petitioner now assigns said verdict, and its reception herein as error.

And said plaintiff and petitioner, through its said counsel, then and there gave notice of motion for a new trial.

And to said verdict, said defendant, said Honolulu Plantation Company, through its said counsel, then and there duly excepted as contrary to the law and the evidence, and the weight of the evidence, and gave notice of motion for a new trial.

And thereafter, and within due time, to wit, on March 20th, 1902, said plaintiff and petitioner, through its said counsel, prepared, served and filed its motion for a new trial of the above-entitled action as to the issues therein joined in between it and said Honolulu Plantation Company, said defendant; and then and there, to wit, on said March 20th, 1902, prepared, served and filed its notice of the time and place of presentation and hearing of said motion of said plaintiff and petitioner for said new trial; and said plaintiff and petitioner, through its said counsel, did, on said March 20th, 1902, duly serve upon said Honolulu Plantation Company, said defendant, each of

the above-mentioned papers, to wit, said motion of said plaintiff and petitioner for a new trial, and also said notice of the time and place of presentation and hearing of said motion for a new trial.

Said motion of said plaintiff and petitioner for said new trial is as follows, to wit:

[Title of Court and Cause.]

Motion of Plaintiff and Petitioner for a New Trial Herein.

Now comes the above-named plaintiff and petitioner in the above-entitled action, and moves said Court that the verdict made, given and rendered herein on March 11th, A. D. 1902, by the jury called to try the issues in the above-entitled cause between said plaintiff and petitioner and Honolulu Plantation Company, a corporation, one of the defendants and respondents above named, be annulled, vacated and set aside, and that a new trial be granted herein, upon the following grounds, namely:

1. Insufficiency of the evidence to justify said verdict.

2. That the verdict is contrary to and against the law and the evidence.

3. That the verdict is not sustained or justified by either the law or the evidence or the weight of the evidence herein.

4. That said verdict is excessive in this, that it attempts to award excessive, unreasonable and inconsistent compensation or damages herein.

5. That said verdict is contrary to and against the charge of the Court herein.

6. Errors in law occurring during the trial and excepted to by said plaintiff and petitioner.

And said plaintiff and petitioner now makes and al-

leges and presents in and upon this motion for a new trial, the following assignment and specification of errors, to wit:

ASSIGNMENT OF ERRORS UNDER THE AFORESAID GROUND NO. 1.

(a) Said evidence is wholly insufficient to justify said verdict in this, that there is no evidence to support the finding that the market value of the leasehold interest of said Honolulu Plantation Company in the land involved herein is of the sum of $94,000 00-100, or any other sum in excess of $75,000; and in this behalf plaintiff and petitioner shows in and by the affidavit of J. J. Dunne, Esq., Assistant United States Attorney for said District, hereto attached, made a part hereof, and marked Exhibit "A," and in and by the judgment of said Court in said affidavit set out, that in the above-entitled action, between the same parties, upon the same pleadings, and upon the same evidence, the "full compensation" of said Honolulu Plantation Company herein "for its damages of every kind and character in this case," was formerly, to wit, on January 25th, 1902, adjudicated by said Court not to exceed the sum of $75,000, said "full compensation" including said market value of said leasehold interest.

(b) Said evidence is wholly insufficient to justify said verdict in this, that there is no evidence to support the findings that the market value of all improvements upon the property condemned in the above-entitled action is of the sum of $8,523 or any other sum; and in this behalf plaintiff and petitioner shows in and by the affidavit of J. J. Dunne, Esq., Assistant United States Attor-

ney for said District, hereto attached and made a part hereof, and marked Exhibit "A," and in and by the judgment of said Court in said affidavit set out, that in the above-entitled action, between the same parties, upon the same pleadings, and upon the same evidence, the "full compensation" of said Honolulu Plantation Company herein "for its damages of every kind and character in this case," was formerly, to wit, on January 25th, 1902, adjudicated by said Court not to exceed the sum of $75,000.

(c) The evidence is wholly insufficient to justify said verdict in this, that it wholly fails to show that said Honolulu Plantation Company, is entitled to receive as compensation or damages for the taking and condemnation of their leasehold interest in the land involved in the above-entitled action, any sum whatever in excess of $75,000.

(d) The evidence is wholly insufficient to justify said verdict in this, that it wholly fails to show that said Honolulu Plantation Company is entitled to receive as compensation or damages for the taking and condemnation of improvements upon said land any sum whatever.

(e) Said evidence is wholly insufficient to justify said verdict in this, that it wholly fails to show any value of said leasehold interest in excess of $75,000.

(f) Said evidence is wholly insufficient to justify said verdict in this, that it wholly fails to show either the existence upon the land condemned herein of any improvements, or the market value, if any, of such improvements.

ASSIGNMENT OF ERRORS UNDER THE AFORESAID GROUND NO. 2.

(a) Said verdict is contrary to and against law and the evidence because of errors of law occurring during the trial and excepted to by plaintiff and petitioner, and plaintiff and petitioner hereby makes express reference to the detailed specifications herein included in the assignment of errors under the aforesaid ground No. 6, and makes them and each of them part and parcel of this specification.

(b) Said verdict is contrary to and against the law and the evidence because of the insufficiency of the evidence to justify said verdict; and said plaintiff hereby makes express reference to the detailed specifications herein included in the assignment of errors under the aforesaid ground No. 1, and makes them and each of them part and parcel of this specification.

(c) Said verdict is contrary to and against the law and evidence, because of its finding that the market value of the leasehold interest of said Honolulu Plantation Company in the land herein condemned is the sum of $9,400, or any other sum whatever in excess of $75,000.

(d) Said verdict is contrary to and against the law and the evidence because of its finding that the value of all improvements upon the property condemned in the above-entitled action is of the sum of $8,523, or any other sum whatever.

(e) Said verdict is contrary to and against the law and the evidence, because as shown in and by the affidavit of J. J. Dunne, Esq., Assistant United States Attorney for said District, hereto attached, made a part hereof, and marked Exhibit "A," and in and by the judg-

ment of said Court in said affidavit set out, it appears that, in the above-entitled action, between the same parties, upon the same pleadings, and upon the same evidence, the "full compensation" of said Honolulu Plantation Company herein "for its damages of every kind and character in this case" was formerly, to wit, on January 25th, 1902, adjudicated by said Court not to exceed the sum of $75,000.

ASSIGNMENT OF ERRORS UNDER THE AFORESAID GROUND NO. 3.

(a) Said verdict is not sustained or justified by either the law or the evidence or the weight of the evidence herein, because of errors of law occurring during the trial and excepted to by plaintiff and petitioner; and plaintiff and petitioner hereby makes express reference to the detailed specifications herein included in the assignment of errors under the aforesaid ground No. 6, and makes them and each of them part and parcel of this specification.

(b) Said verdict is not sustained or justified by either the law or the evidence or the weight of the evidence herein, because of the insufficiency of the evidence to justify said verdict; and said plaintiff and petitioner hereby makes express reference to the detail specifications herein included in the assignment of errors under the aforesaid ground No. 1, and makes them and each of them part and parcel of this specification.

(c) Said verdict is not sustained or justified by either the law or the evidence, or the weight of the evidence herein, because of its finding that the market value of the leasehold interest in said Honolulu Plantation Com-

pany in the land herein condemned is of the sum of $94,000, or any other sum whatever in excess of $75,000.

(d) Said verdict is not sustained or justified by either the law or the evidence, or the weight of the evidence herein, because of its finding that the value of all improvements upon the property condemned in the above-entitled action is of the sum of $8,523, or any other sum whatever.

(e) Said verdict is not sustained or justified by either the law or the evidence, or the weight of the evidence herein, because as shown and by the affidavit of J. J. Dunne, Esq., Assistant United States Attorney for said District, hereto attached, and made a part hereof, and marked Exhibit "A," and in and by the judgment of said Court in said affidavit set out, it appears that, in the above-entitled action, between the same parties, upon the same pleadings and upon the same evidence, the "full compensation" of said Honolulu Plantation Company herein for "its damages of every kind and character in this case," was formerly, to wit, on January 25th, 1902, adjudicated by said Court not to exceed the sum of $75,000.

ASSIGNMENT OF ERRORS UNDER THE AFORESAID GROUND NO. 4.

(a) That said verdict is excessive in this, that it attempts to award excessive, unreasonable and inconsistent compensation or damages herein.

(b) The compensation or damages attempted to be awarded by said verdict of said jury is excessive, unreasonable and inconsistent in this, that the amount attempted to be awarded by said verdict as compensa-

tion or damges for the taking of the alleged improvements claimed to have been upon the land sought to be condemned herein, was and is grossly and unreasonably excessive, without the evidence, and with no evidence to support it, it not appearing in the evidence either that any improvements were upon the land sought to be condemned or what, if any, was the market value thereof.

(c) The compensation or damages attempted to be awarded by said verdict of said jury is excessive, unreasonable and inconsistent in this, that the amount attempted to be awarded by said verdict as compensation or damages for the taking of the leasehold interest claimed in the land sought to be condemned by said Honolulu Plantation Company was and is grossly and unreasonably excessive, without the evidence, with no evidence to support it, and against the evidence in the case.

(d) The compensation or damages attempted to be awarded by said verdict of said jury is excessive, unreasonable, and inconsistent in this, that as shown in and by the affidavit of J. J. Dunne, Esq., Assistant United States Attorney for said District, hereto attached, made a part hereof, and marked Exhibit "A," and in and by the judgment of said Court in said affidavit set out, it appears that, in the above-entitled action, between the same parties, upon the same pleadings, and upon the same evidence, the "full compensation" of said Honolulu Plantation Company herein "for its damages of every kind and character in this case," was formerly, to wit, on January 25th, 1902, adjudicated by said Court not to exceed the sum of $75,000.

ASSIGNMENT OF ERRORS UNDER THE AFORESAID GROUND NO. 5.

(a) In arriving at said verdict, said jury failed to consider the testimony as a whole, or fairly to weigh all the testimony, both direct and indirect, with all reasonable inferences to be drawn therefrom; but on the contrary, limited its consideration to isolated portions of said testimony.

(b) In arriving at said verdict, said jury failed to consider the fair market value of the property involved at the time of the taking, to wit, on July 6th, 1901, in its then actual condition.

(c) In arriving at said verdict, said jury considered the mere speculative or possible value, and not market value.

(d) In arriving at said verdict, said jury was neither guided nor governed by the preponderance of the evidence.

(e) In arriving at said verdict, said jury was neither guided nor governed by the amount of the just compensation to be awarded to the defendant herein for the taking of its property.

(f) In arriving at said verdict, said jury gave undue and excessive weight to the expert testimony introduced by said defendant.

ASSIGNMENT OF ERRORS UNDER THE AFORESAID GROUND NO. 6.

(a) The Court erred in overruling the objection of plaintiff and petitioner to the following question asked by said Honolulu Plantation Company from the witness U. S. G. White, during his cross-examination, to wit:

"Now, do you know whether there is a mill belonging to the plantation a mile above this land?"

Said question was objected to by the plaintiff and petitioner as not proper cross-examination, and upon the ground that it involved some land other than the land in controversy, the witness having testified that there was no mill on the land in controversy on July 6th, 1901, and the witness not having been asked as to any other land. Said objection was overruled by the Court, and plaintiff and petitioner then and there duly excepted to said ruling, and now assigns the same as error. (Reporter's Transcript, pp. 63-4.)

(b) Said Court erred in overruling the objection of plaintiff and petitioner to the following question asked by said Honolulu Plantation Company from said witness U. S. G. White, during his cross-examination, to wit:

"What is the size, Captain, of that mill?"

Said question was objected to by plaintiff and petitioner as immaterial, irrelevant, and not cross-examination, and as involving entirely new matter to which no reference is made on the direct examination, and as seeking in the midst of a cross-examination to prove the case of said Honolulu Plantation Company. Said objection was overruled by the Court, and plaintiff and petitioner then and there duly excepted to said ruling and now assigns the same as error. (Rep. Tr., p. 65-7.)

(c) Said Court erred in overruling the objection of plaintiff and petitioner to the following question asked by said Honolulu Plantation Company from said witness U. S. G. White, during his cross-examination, to wit:

"How far is this Halawa Valley that you have testified about in your first answer that I asked in regard to it,

from the land in question—the nearest portion to the land in question?"

Said question was objected to by the plaintiff and petitioner upon the ground that it was wholly immaterial, not proper cross-examination, not addressed to any subject matter to which the attention of the witness was called on the examinaton in chief, and upon the additional ground that the witness might as well be asked how far Paris is from this piece of land.

Said objection was overruled by the Court, and plaintiff and petitioner then and there duly excepted to said ruling and now assigns the same as error. (Reporter's Transcript, p. 69-70.)

(d) Said Court erred in overruling the objection of plaintiff and petitioner to the following question asked by said Honolulu Plantation Company from the witness J. W. Pratt, during his cross-examination, to wit:

"Now, Mr. Pratt, how was this return made up—what kind of a return is this under the law?"

Said question was objected to by said plaintiff and petitioner upon the ground that it was a double question. Said objection was overruled by the Court, and plaintiff and petitioner then and there duly excepted to said ruling, and now assigns the same as error. (Reporter's Transcript, p. 96.)

(e) Said Court erred in overruling the objection of plaintiff and petitioner to the following question asked by said Honolulu Plantation Company from the witness F. K. Archer during his cross-examination, to wit:

"Now, Mr. Archer, do you know what the land is capable of yielding in sugar?"

Said question was objected to by plaintiff and peti-

tioner upon the ground that it was not proper cross-examination, it appearing that no crop had ever been raised on that land. Said question was overruled by the Court, and plaintiff and petitioner then and there duly excepted to said ruling, and now assigns the same as error. (Reporter's Transcript, p. 112.)

(f) Said Court erred in refusing to permit plaintiff and petitioner to state its objections to the following question asked by said Honolulu Plantation Company from said witness F. K. Archer, during his cross-examination, to wit:

"Do you know whether the Honolulu Plantation Company had, on the 6th of July, 1901, a water supply that was immediately available to this land in question?"

And in this behalf, plaintiff and petitioner shows that the following occurred:

"Mr. SILLIMAN.—Do you know whether the Honolulu Plantation Company had, on the 6th of July, 1901, a water supply that was immediately available to this land in question?"

Mr. DUNNE.—I object to that question on the ground—

The COURT.—Ask the question.

Mr. DUNNE.—We except."

And in this behalf plaintiff and petitioner shows that said question was immaterial, irrelevant and incompetent, called for the conclusion of the witness, was not proper cross-examination, did not exhibit the actual condition of the land in question on July 6th, 1901, and involved an inquiry into the condition of land other than the land involved in this cause.

To said ruling of said Court, plaintiff and petitioner

then and there duly excepted, and now assigns the same as error. (Reporter's Transcript, p. 119.)

(g) Said Court erred in overruling the objection of plaintiff and petitioner to the following question asked by said Honolulu Plantation Company from said witness F. K. Archer, during his cross-examination, to wit:

"What was the extent of that water supply?"

Said question was objected to by plaintiff and petitioner upon the ground that it was immaterial, that it did not exhibit the actual condition of the land in question on July 6th, 1901, that it was going outside of the land in controversy, and involved an inquiry into the condition of land other than the land involved in this cause. Said objection was overruled by the Court, and plaintiff and petitioner then and there duly excepted to said ruling, and now assigns the same as error. (Reporter's transcript, p. 119-20.)

(h) Said Court erred in refusing to grant the motion of plaintiff and petitioner to strike out the testimony of the witness F. K. Archer relative to the alleged water supply. Said motion was made upon the ground that this alleged water supply appeared from the testimony of said witness not to be upon the land in controversy, and that the evidence of the witness was merely an attempt to get before the jury evidence of the value of the land in controversy by some development or improvement upon some other land. Said motion was denied by the Court, and plaintiff and petitioner then and there duly excepted to said ruling, and now assigns the same as error. (Reporter's Tr., p. 120.)

(i) Said Court erred in overruling the objection of plaintiff and petitioner to the following question asked

by said Honolulu Plantation Company from said witness F. K. Archer during his cross-examination; to wit:

"Do you know whether there is a flowing stream immediately available for use upon this land within the line of the Honolulu Plantation Company?"

Said question was objected to by plaintiff and petitioner upon the ground that it was an attempt to fix the value of this property in controversy by other things elsewhere. Said objection was overruled by the Court; and plaintiff and petitioner then and there duly excepted to said ruling and now assigns the same as error. (Reporter's Transcript; p. 131.)

(j) Said Court erred in overruling the objection of plaintiff and petitioner to the following question asked by said Honolulu Plantation Company from said witness F. K. Archer, during his cross-examination, to wit:

"Well, now, assuming that the land is in the same condition or substantially the same condition on the 6th of July, 1901, and considering its situation, and the uses it might be put to, and the improvements put upon it, the plowing that has been done, the clearing that has been done, and all of its usefulness, the whole property of the Honolulu Plantation Company that is available for use, in connection with that land, assuming those things, what would you say as to the value of the leasehold interest?"

Said question was objected to by plaintiff and petitioner upon the ground that it was incompetent, that it was an incompetent, hypothetical question, and that it involved matters not established by any evidence in this case.

Said objection was overruled by the Court; and plaintiff and petitioner then and there duly excepted to said

ruling; and now assigns the same as error. (Reporter's Transcript; p. 122.)

(k) Said Court erred in overruling the objection of plaintiff and petitioner to the following question asked by said Honolulu Plantation Company from the witness F. W. Thrum, during his direct examination, to wit:

"Now, Mr. Thrum, how do you know what this land will produce, or whether it is good cane land or not?"

Said question was objected to by plaintiff and petitioner as immaterial, purely speculative and double-headed. Said objection was overruled by the Court, and plaintiff and petitioner then and there duly excepted to said ruling, and now assigns the same as error. (Reporter's Transcript, p. 148.)

(l) Said Court erred in overruling the objection of plaintiff and petitioner to the following question asked by said Honolulu Plantation Company from said witness F. W. Thrum, during his direct examination, to wit:

"Do you know the yield of the Halawa Valley?"

Said question was objected to by plaintiff and petitioner upon the ground that the yield of the Halawa Valley was wholly immaterial it not appearing that the land in controversy ever had any yield. Said objection was overruled by the Court; and plaintiff and petitioner then and there duly excepted to said ruling; and now assigns the same as errror. (Reporter's Tr. p. 150.)

(m) Said Court erred in sustaining the objection of said Honolulu Plantation Company to the following question asked by said plaintiff and petitioner from said witness F. W. Thrum during his direct examination; to wit:

"If that land, that particular strip of land, is a leasehold, leasehold interest of 40 years, say, on that particular piece of land seven years of which was fully paid up the balance of which was held at three and one-half per cent of the sugar produced; provided it did not fall below $4,000 per annum for the entire tract of land, including other land, the first lease including 2,900 acres, and the second lease 2,122 acres, if such a leasehold were offered for sale in the public market, what would you be willing to pay per acre for it?"

Said objection was made upon the ground that the question was irrelevant and that the witness was unqualified to express an opinion; said Court sustained said objection on the ground that said witness was not an expert; and plaintiff and petitioner then and there duly excepted to said ruling, and now assigns the same as error, (Reporter's Transcript, p. 154.)

(n) Said Court erred in granting the motion made by said Honolulu Plantation Company to strike out from the testimony of said witness F. W. Thrum, the following testimony given by said witness upon being recalled to wit:

"Mr. DUNNE.—One question, Mr. Thrum, you stated that part of your ocupation on the Ewa Plantation, for instance, was the selection of cane land?

"The WITNESS.—Well, the first case was in 1895, when Mr. Lowrie was the manager, and many acres were valuable for the cultivation of cane below field 19—that was when the extent of the plantation in that direction. I was sent out there, and started at field 19; and I cut lines through the algeroba, the glue and the lantana, and was to report the land that I considered valuable

for sugar cane; and after about two or three weeks later, I had got around this tract, field 19, and reported to him the number of acres that I considered valuable for sugar cane in that vicinity. My report was accepted."

Said motion to strike out was made upon the ground that this testimony was not proper redirect examination; said Court granted said motion upon the ground that said testimony was not material; and plaintiff and petitioner then and there duly excepted to said ruling, and now assigns the same as error. (Reporter's Transcript, p. 1557.)

(o) Said Court erred in overruling the objection of plaintiff and petitioner to the following question asked by the said Honolulu Plantation Company from the witness J. A. McCandless, during his cross-examination, to wit:

"What is the value set on that leasehold interest of 142 acres (referring to a certain tract of 142 acres on Ford Island, originally sought to be condemned in this action, but as to which a discontinuance of the action was subsequently made and filed by plaintiff and petitioner and ordered by the Court)?"

Said question was objected to by the plaintiff and petitioner upon the ground that the records of this Court show that this entire matter was settled amicably between the Oahu Sugar Company and the Government; that this was not proper cross-examination; that it is directed to any matter testified to by the witness in chief; and that it has no materiallity. Said objection was overruled by the Court, and plaintiff and petitioner then and there duly excepted to said ruling and now assigns the same as error. (Reporter's Transcript, p. 180-182,)

(p) Said Court erred in overruling the objection of plaintiff and petitioner to the following question asked by said Honolulu Plantation Company from the witness J. A. Low, during his direct examination, to wit:

"Just explain the nature of your duties, and the nature of your experience, and the nature of your study on the subject (of the growth and manufacture of sugar.)"

Said question was objected to by plaintiff and petitioner upon the ground that it involves three separate and distinct questions. Said objection was overruled by the Court, and plaintiff and petitioner then and there duly excepted to said ruling, and now assigns the same as error. (Reporter's Transcript, p. 188.)

(q) Said Court erred in overruling the objection of plaintiff and petitioner to the following question asked by said Honolulu Plantation Company from the witness J. A. Low, during his direct examination, to wit:

"Why not (that is to say, why was not the sugar grown on this land by the Honolulu Plantation Company)?"

Said question was objected to by plaintiff and petitioner upon the ground that the reason why sugar was not grown upon that land by the Honolulu Plantation Company was wholly immaterial, because it is the fact that should be dealt with, and not the reason which may be had for that fact. Said objection was overruled by the Court, and plaintiff and petitioner then and there duly excepted to said ruling, and now assigns the same as error. (Reporter's Transcript, p. 192.)

(r) Said Court erred in denying the motion of plaintiff and petitioner to strike out the following testimony elicited by said Honolulu Plantation Company from the witness C. Bolte, during his direct examination, to wit:

"Q. Now, considering the property sought to be condemned in the state in which you saw it on the day that you viewed it, that it is in substantially the same state on the 6th of July, 1901, considering its situation and the uses that might be made of it, and to which it was adapted, and assuming that the plantation has a thirty-nine years' lease, seven years' rental of which has been paid, and the remaining thirty-two years is upon the basis of a crop payment—that is, three and a half per cent of the sugar produced, and the payment of the taxes, the lease including other land, the minimum rent upon the other land which is not material, and assuming there are 342 acres of cane land in the area sought to be condemned,what in your opinion was the value of the leasehold interest of that land on the 6th of July, 1901, to the Honolulu Plantation Company?

"A. Four hundred and fifty thousand dollars."

Said motion to strike out was made upon the ground that what this might be worth to the Honolulu Plantation Company is not a fair test of the market value. Said motion was denied by the Court, and plaintiff and petitioner then and there duly excepted to said ruling, and now assigns the same as error. (Reporter's Transcript, p. 210-211.)

(s) Said Court erred in denying the motion of plaintiff and petitioner to strike out the following testimony elicited by said Honolulu Plantation Company from the witness J. A. Low during his direct examination, when resumed, to wit:

"Q. What is the value of the use of the buildings upon that land for the remainder of your term of the lease?

"A. Thirteen thousand five hundred dollars. I believe the buildings are worth that to this company, because I do not believe that there would be a vestige of the buildings left at the termination of the lease forty years from now."

Said motion to strike out was made upon the ground that this testimony made no attempt to reach the market value, and upon the ground that the value which the use of the buildings might have to any particular individual as distinguished from the market value was illegitimate. Said motion was denied by the Court, and plaintiff and petitioner then and there duly excepted to said ruling, and now assigns the same as error. (Reporter's Transcript, p. 223.)

(t) Said Court in denying the motion of plaintiff and petitioner to strike out the following testimony elicited by said Honolulu Plantation Company from the witness J. A. Low, during his direct examination when resumed, to wit:

"We have similar soil in the Halawa valley that we have raised cane on."

Said motion to strike out was made upon the ground that this was a comparison without side soil, and that the question asked limited the witness to the soil on the land sought to be condemned.

Said motion was denied by the Court, and plaintiff and petitioner then and there duly excepted to said ruling, and now assigns the same as error. (Reporter's Transcript, p. 174-5.)

(u) Said Court erred in overruling the objection of plaintiff and petitioner to the following question asked by said Honolulu Plantation Company from said witness

J. A. Low, during his direct examination, when resumed, to wit:

"Q. What was its (the property sought to be condemned) value on the 6th of July, 1901?

A. To the Honolulu Plantation Company?

Q. Yes, sir."

Said question was objected to by plaintiff and petitioner upon two grounds: First, on the ground that it does not seek to bring forth market value; and second, upon the ground that it seeks to limit the value therein spoken of to an individual, to wit, the Honolulu Plantation Company, as distinguished from market value.

Said objection was overruled by the Court, and plaintiff and petitioner then and there duly excepted to said ruling, and now assigns the same as error. (Reporter's Transcript, p. 179.)

(v) Said Court erred in overruling the objection of plaintiff and petitioner to the following question asked by said Honolulu Plantation Company from said witness J. A. Low, during his direct examination, when resumed, to wit:

"Mr. Low, that portion of the tax return read in evidence here, showing the statement under the heading "Leasehold interest return of real state leases as per schedule 'B,' $50,000—what have you to say in regard to it, Mr. Low, by way of explanation?"

Said question was objected to by plaintiff and petitioner upon the ground that it was ambiguous, and upon the ground that it would permit almost any sort of answer, hearsay, or otherwise. Said objection was overruled by the Court, and plaintiff and petitioner then and there duly excepted to said ruling, and now assigns the same as error. (Reporter's Transcript, p. 230-231.)

(w) Said Court erred in overruling the objection of plaintiff and petitioner to the following question asked by said Honolulu Plantation Company from the witness W. R. Castle, during his direct examination, to wit:

"Q. What knowledge have you of the development of the plantations in that district (meaning the District of Ewa)?"

Said question was objected to by plaintiff and petitioner upon the ground that the development of other plantations in that district was entirely irrelevant and immaterial to any issue in this case, said objection was overruled by the Court, and plaintiff and petitioner then and there duly excepted to said ruling, and now assigns the same as error. (Reporter's Tr., p. 257-8.)

(x) Said Court erred in overruling the objection of plaintiff and petitioner to the following question asked by said Honolulu Plantation Company from said witness W. R. Castle, during his direct examination, to wit:

"Now, Mr. Castle, considering the property sought to be condemned, the state which you saw it in on the day that you viewed it, and assuming that it was in substantially the same state on July 6th, 1901, and taking into consideration the situation of the land and all the uses that might be made of it, and assuming that the plantation had a thirty-nine years' lease, and that seven years' rental has been paid, and that the rental for thirty-two years is on the basis of three and one-half per cent of the sugar produced, and the payment of taxes, the lease covering other lands in addition to this, and for a minimum rental and assuming that 342 acres of cane land of the land sought to be condemned—what,

in your opinion, was the market value of that leasehold on the 6th of July last?"

Said question was objected to by plaintiff and petitioner as immaterial, irrelevant and incompetent, not justified by the evidence, and without foundation in this, that there is no evidence here that this witness does know what was the market value of such a leasehold as is described in the question, on July 6th, 1901. Said objection was overruled by the Court, and plaintiff and petitioner then and there duly excepted to said ruling, and now assigns the same as error. (Reporter's Tr., p. 260-1.)

(y) Said Court erred in overruling the objection of plaintiff and petitioner to the following question asked by said Honolulu Plantation Company from the witness W. W. Goodale during his direct examination, to wit:

"Now, Mr. Goodale, considering this land sought to be condemned, in the state in which you saw it on the day that you viewed it, and assume that it is in substantially the same state or was on the 6th of July last year, and considering the situation of it and the uses that might be made of the land and to which it was adapted, and assuming that the plantation had a thirty-nine years' lease, seven years' rental of which had been paid, the rental for thirty-two years is based upon three and one-half per cent of the sugar produced, the particular lease covers other land as well as this, has a minimum basis of rental and includes other lands, and assume that there is three hundred and forty-two acres of cane land, what, in your opinion, is the market value of the leasehold to the Honolulu Plantation Company of the land sought to be condemned on the 6th of July last?"

Said question was objected to by plaintiff and petitioner as immaterial, irrelevant and incompetent, and without foundation, in this, that it is not a fair statement of the evidence, and without foundation, in this, that it does not appear that the witness does know the market value of such property on the 6th of July, 1901. Said objection was overruled by the Court, and plaintiff and petitioner then and there duly excepted to said ruling, and now assigns the same as error. (Reporter's Tr., p. 271-2.)

(z) Said Court erred in overruling the objection of plaintiff and petitioner to the following question asked by said Honolulu Plantation Company from the witness G. F. Renton, during his direct examination, to wit:

"Now, considering this property sought to be condemned in the state that you saw it, on that day that you viewed it, and assuming that it is in substantially the same situation on the 6th of July, 1901, and assuming that that there is a lease for thirty-nine years, seven years of which has been paid up and the rental for thirty-two years is on the basis of three and one-half per cent of the sugar produced, the lease covers other land as well as this, has a minimum rental which, however, has no materiality to the question—the payment of taxes, and considering all the uses and purposes to be made of the land and the situation in which it exists on that day, and assuming, further, that there was three hundred and forty-two acres of cane land within the area sought to be condemned, what in your opinion was the market value of the leasehold interest of the Honolulu Plantation Company on the 6th day of July last year?"

Said question was objected to by the plaintiff and peti-

tioner as immaterial, irrelevant and incompetent, and not an accurate and faithful statement of the evidence, and without foundation in this, that it does not appear that the witness knows what the market value of said leasehold interest was at the time mentioned. Said objection was overruled by the Court, and plaintiff and petitioner then and there duly excepted to said ruling and now assigns the same as error. (Reporter's Transcript, p. 284-5.)

(aa) Said Court erred in overruling the objection of plaintiff and petitioner to the following question asked by said Honolulu Plantation Company from the witness F. Meyer, during his direct examination, to wit:

"Well, considering the property sought to be condemned as to its location and all the uses that could be made of it, and assuming that it is substantially in the same situation as it was on the 6th day of July, 1901, and assuming that there is a lease of thirty-nine years, seven years of which are paid up, and thirty-two years of which are on the basis of three and one-half per cent of the sugar produced together with the payment of taxes, and also saying that there is a minimum rental.

The COURT.—There should be an addition, that this three and one-half per cent should not be less than four thousand dollars per year.

Mr. SILLIMAN (Continuing.)—And assuming, also, that there are 342 acres of cane land in the area sought to be condemned, what, in your opinion, was the market value of the leasehold interest on the 6th of July, 1901?"

Said question was objected to by plaintiff and petitioner as incompetent, irrelevant and immaterial, as not a fair and accurate statement, as not a competent, hypo-

thetical question, and as without foundation, in this, that it does not appear that the witness knows the market value on the 6th of July, 1901. Said objection was overruled by the Court, and plaintiff and petitioner then and there duly excepted to said ruling, and now assigns the same as error. (Reporter's Transcript, p. 292-3.)

(bb) Said Court erred in overruling the objection of plaintiff and petitioner to the following question asked by said Honolulu Plantation Company from the witness A. Ahrens, during his direct examination, to wit:

"Now, considering the property sought to be condemned and in the same space in which you saw it on the day that you viewed, that is in October, and assuming that it was in substantially the same situation that it was on July 6th, 1901, and after taking into consideration the use that might be made, the purpose to which it is adapted, and assuming that there is a thirty-nine years' lease, seven years of which are paid up, and the balance of the term is upon the basis of a three and one-half per cent of the stock, and I will also state for your information that there is a minimum basis in which includes other land, now, also assuming that there was 342 acres of cane land included within the 561 acres, what, in your opinion, was the market value of the leasehold interest on the 6th of July last?"

Said question was objected to by plaintiff and petitioner as irrelevant and incompetent, and not a proper and accurate statement of the testimony, and as without foundation, in this, that it does not appear that the witness knows what the market value of such a leasehold was on July 6th, 1901. Said objection was overruled by the Court, and plaintiff and petitioner then and there

duly excepted to said ruling, and now assigns the same as error. (Reporter's Transcript, p. 300.)

(cc) Said Court erred in overruling the objection of plaintiff and petitioner to the following question asked by the Honolulu Plantation Company from the witness J. T. Crawley, on direct examination, to wit:

"Mr. SILLIMAN.—What do you know about it?

"The WITNESS.—About the productive capacity of this soil?

"The COURT.—Of this land?"

Said question was objected to by plaintiff and petitioner upon the ground that it was immaterial, irrelevant and incompetent, and called for mere speculation, and that there was no foundation upon which any reasonable person could base an opinion. Said objection was overruled by the Court, and plaintiff and petitioner then and there duly excepted to said ruling, and now assigns the same as error. (Reporter's Transcript, p. 305-6.)

(dd) Said Court erred in overruling the objection of plaintiff and petitioner to the following question asked by the Honolulu Plantation Company from the witness J. F. Morgan, during his direct examination, to wit:

"Now, Mr. Morgan, taking into consideration the property sought to be condemned and its location and situation, and what can be done with the situation as you saw it on the day that you viewed it, the uses and purposes that the land can be put to, and assuming that the Honolulu Plantation Company has a thirty-nine years' lease, seven years of which were paid up, and the balance of the term is based upon three and one-half per cent of the sugar produced from the land, the lease also covering other land, having a rental basis, and assum-

ing that there was 342 acres of cane land upon the land sought to be condemned, what would you say was the market value of the leasehold interest on the 6th of July, 1901?"

Said question was objected to by plaintiff and petitioner as irrelevant and incompetent, and not a proper or accurate statement of the evidence, and as without foundation, in this that it does not appear that the witness does know what the going market value was on July 6th, 1901.

Said objection was overruled by the Court, and plaintiff and petitioner then and there duly excepted to said ruling, and now assigns the same as error. (Reporter's Transcript, p. 312-13.)

(ee) Said Court erred in overruling the objection of plaintiff and petitioner to the following question asked by said Honolulu Plantation Company from said witness J. F. Morgan, during his redirect examination, to wit:

"How many mills are there in the vicinity of this land?"

Said question was objected to by plaintiff and petitioner as irrelevant, immaterial and incompetent and not proper redirect examination. Said objection was overruled by the Court, and plaintiff and petitioner then and there duly excepted to said ruling, and now assigns the same as error. (Reporter's Transcript, p. 316.)

(ff) Said Court erred in overruling the objection of plaintiff and petitioner to the following question asked by said Honolulu Plantation Company from the witness L. A. Thurston, during his direct examination, to wit:

"Now, considering the property sought to be condemned, Mr. Thurston, was in the same state in which you saw it on the day on which you visited it last, and

assuming that it was in substantially the same state and condition on the 6th of July, 1901. And taking into consideration the location of the land and of the uses to which it might be put, and to which it was adapted, and assuming the plantation has thirty-nine years' lease, seven years' rental of which is paid up, and the rental for thirty-two years thereof is on a basis of three and one-half per cent of the sugar produced, and the payment of taxes (I will say that the leasehold covers other land and has a minimum rental of $4,000, covering practically 2,000 acres, and assuming that there was 342 acres of cane land in the area sought to be condemned, what is your opinion of the market value of that leasehold interest on the 6th of July, 1901?"

Said question was objected to by plaintiff and petitioner as irrelevant and incompetent, and as not a faithful and accurate statement of the evidence and without foundation, in this, that it does not appear that the witness knows what the market value of this leasehold was on the 6th of July, 1901. Said objection was overruled by the Court, and plaintiff and petitioner then and there duly excepted to said ruling, and now assigns the same as error. (Reporter's Transcript, p. 319-20.)

(gg) Said Court erred in overruling the objection of plaintiff and petitioner to the following question asked by said Honolulu Plantation Company from said witness L. A. Thurston, during his redirect examination, to wit:

"What can you say as to the quality of the soil on the land sought to be condemned as to its producing any crop of sugar?"

Said question was objected to by plaintiff and petitioner as immaterial, irrelevant and incompetent, and not proper redirect examination. Said objection was

overruled by the Court, and plaintiff and petitioner then and there duly excepted to said ruling, and now assigns the same is error. (Reporter's Transcript, p. 323.)

(hh) Said Court erred in overruling the objection of plaintiff and petitioner to the following question asked by said Honolulu Plantation Company from the witness J. R. Higby, during his direct examination, to wit:

"Are you able to state the use of those buildings for the term of thirty-nine years?"

Said question was objected to by plaintiff and petitioner as irrelevant and incompetent, and upon the further ground that it does not call for market value, but calls for merely an individual or personal value. Said objection was overruled by the Court, and plaintiff and petitioner then and there duly excepted to said ruling and now assigns the same as error. (Reporter's Transcript, p. 325.)

(ii) Said Court erred in its charge to the jury upon the subject of expert and opinion evidence, in charging and instructing said jury that "great weight should always be given to the opinion honestly expressed and fairly given of those persons familiar with the subject."

(jj) Said Court erred in refusing to give the jury the first instruction requested by plaintiff and petitioner.

(kk) Said Court erred in refusing to give to the jury the second instruction requested by the plaintiff and petitioner.

(ll) Said Court erred in refusing to give to the jury the fourth instruction requested by the said plaintiff and petitioner.

(mm) Said Court erred in refusing to give to the jury the fifth instruction requested by said plaintiff and petitioner.

(nn) Said Court erred in refusing to give to the jury the sixth instruction requested by said plaintiff and petitioner.

(oo) Said Court erred in refusing to give to the jury the seventh instruction requested by said plaintiff and petitioner.

(pp) Said Court erred in refusing to give to the jury the eighth instruction requested by said plaintiff and petitioner.

(qq) Said Court erred in refusing to give the jury the ninth instruction requested by said plaintiff and petitioner.

(rr) Said Court erred in permitting and receiving the verdict rendered by the jury herein.

(ss) Said Court erred in authorizing, ordering and permitting a trial by jury herein.

(tt) Said jury having returned its verdict herein, on March 11th, 1902, plaintiff and petitioner then and there duly excepted to said verdict upon the following grounds: 1. That said verdict is excessive, in this, that it attempts to award excessive, unreasonable and inconsistent compensation; 2. That said verdict is contrary to and against the law and the evidence herein; 3. That said verdict is not sustained or justified by either the law or the evidence herein, or the weight of the evidence herein, and that said evidence is insufficient to justify said verdict; and 4. That said verdict is contrary to and against the charge of the Court herein; and said plaintiff and petitioner then and there gave due notice of its intention to move for a new trial herein; and said exceptions to said verdict are now relied upon by said plaintiff and petitioner as ground for new trial, and plaintiff and petitioner now assigns the same as error.

And in further support of this motion for a new trial, said plaintiff and petitioner relies upon any error apparent from the pleadings, reporter's transcript of testimony, and all other papers and documents on file in said cause and court, not covered by the grounds of exception hereinabove set forth.

Plaintiff and petitioner makes a part of this motion the Reporter's Transcript of the testimony and his record of all proceedings had upon the trial of said cause, as well as all exhibits, papers, pleadings and documents in said cause, including the request of plaintiff and petitioner for instructions to said jury, and any other paper now on file in said cause and court, or forming any part of the record or papers in said cause, and in particular, plaintiff and petitioner makes the entire Reporter's Transcript of the testimony and the rulings of the Court herein, a part of this motion for a new trial, and of the specific grounds hereinabove set forth.

Dated, Honolulu, Hawaii, March 20th, 1902.

ROBERT W. BRECKONS,
United States Attorney for said District,
J. J. DUNNE,
Assistant United States Attorney for said District, Counsel for Plaintiff and Petitioner.

Exhibit "A."

[Title of Court and Cause.]

AFFIDAVIT OF J. J. DUNNE, ESQ.

United States of America,
Territory of Hawaii. } ss.

J. J. Dunne, being first duly sworn, deposes and says: I am, and during all the times herein mentioned have been Assistant United States Attorney in and for said District, and in charge of the above-entitled litigation. I am familiar with said litigation from its commencement to the present time. Among said defendants and respondents who appeared and made answer in said litigation, is the Honolulu Plantation Company, a corporation. After issue joined between said plaintiff and petitioner and said Honolulu Plantation Company, the trial of the issue between said parties was set down by said Court for Monday, December 23d, 1901, and on said last-mentioned date, said trial commenced. Said trial was had between the same parties, and upon the same pleadings as in the second trial hereinafter referred to as commencing on March 3d, 1902. Said trial proceeded until Friday, January 10th, 1902, when the testimony was closed, and the cause argued to the jury. Thereafter, on January 11th, 1902, the jury was charged and retired to deliberate upon its verdict. Thereafter, on Monday, January 13th, 1902, the verdict of said jury in said cause was received and read in open court. Said verdict was in writing and is now part of the files in said cause and court, and is hereby expressly referred to and made a part of this affidavit. Said verdict found the value of

all improvements upon the condemned property to be $15,208, and the value of the leasehold interest in the condemned property to be $89,792; making a total of $105,000. Counsel on each side then and there duly excepted to said verdict as being contrary to the law and the evidence and the weight of the evidence, and gave notice of motion for a new trial. Thereafter, within due time, to wit, on January 15th, 1902, said plaintiff and petitioner prepared, served and filed its notice of motion for a new trial, and its motion for a new trial; and thereafter, on January 18th, 1902, said motion for a new trial came on regularly in said court for hearing and disposition, and was submitted to said Court for decision without oral argument, but on briefs. Thereafter, in said cause, on January 25th, 1902, said Court made, gave and rendered its written decisions upon said motion for a new trial hereinabove mentioned, and said written decision is hereto attached, made a part of this affidavit, and marked Exhibit No. 1. Thereafter on January 27th, 1902, said Honolulu Plantation Company, in open court, declined to remit from said verdict the sum of $30,000 as suggested in said written decision of said Court hereinabove mentioned, and thereupon said Court ordered that the new trial of said cause be set for March 3d, 1902, in said court. Thereafter on Monday, March 3d, 1902, as hereinabove stated, the second trial commenced of the issue joined herein between said plaintiff and petitioner and said Honolulu Plantation Company; and said second trial proceeded until March 11th, 1902, when it was argued by counsel and the charge of the Court given to the jury; and on said March 11th, 1902, said jury made, gave and rendered its verdict, which said verdict is in

writing, and is now part of the files in said cause and court, and is hereby expressly referred to and made a part of this affidavit. Said verdict found the value of all improvements upon the property condemned in this action to be $8,523, and found the value of the leasehold interest in the condemned property to be $94,000, making a total of $102,523. To said verdict so rendered on said second trial of said action, plaintiff and petitioner duly excepted upon the following grounds, to wit:

1. That said verdict is excessive in this, that it attempts to award excessive, unreasonable and inconsistent compensation; 2. That said verdict is contrary to and against the law and the evidence herein; 3. That said verdict is not sustained or justified by either the law or the evidence herein, or the weight of the evidence herein, and that said evidence is insufficient to justify said verdict; 4. That said verdict is contrary to and against the charge of the Court herein; and plaintiff and petitoner then and there gave notice of motion for a new trial. And said verdict was excepted to by said Honolulu Plantation Company also, as contrary to the law and the evidence and the weight of the evidence; and said Honolulu Plantation Company also gave notice of motion for a new trial.

I further show that in this second trial the parties were the same as in the first trial; and that in the second trial the pleadings were the same as in the first trial; and in this behalf I refer to and make a part hereof, the pleadings now on file in said cause. I further show that on the first trial of this cause, six witnesses were called on behalf of plaintiff and petitioner in its case in chief, two of whom (J. W. Pratt and J. A. Low) were called

to identify sundry documentary evidence, and two of whom (U. S. G. White and C. F. Pond) were called to describe the characteristics of the land sought to be condemned, and two of whom (F. K. Archer and A. K. Herbert) were called to place valuations upon the leasehold interest of said Honolulu Plantation Company sought to be condemned in said action. I further show that on the second trial of this cause, seven witnesses were called on behalf of plaintiff and petitioner in its case in chief, two of whom (F. J. Church and J. W. Pratt) were called to identify sundry and documentary evidence, and two of whom (U. S. G. White and F. W. Thrum) were called to describe the characteristics of the land sought to be condemned, and three of whom (F. K. Archer, L. L. McCandless and J. A. McCandless) were called to place valuations upon the leasehold interest of said Honolulu Plantation Company sought to be condemned in said action.

I further show that on the first trial of this cause, eleven witnesses were called on behalf of said Honolulu Plantation Company, upon its case, three of whom (G. J. Wagner, J. T. Crawley and Wong Koon Chan) were called to describe the characteristics of the land sought to be condemned, and eight of whom (J. A. Low, W. W. Goodale, A. Ahrens, G. Renton, F. Meyer, C. Bolte, W. R. Castle and L. A. Thurston) were called to place valuations upon the leasehold interest of said Honolulu Plantation Company sought to be condemnd in said action. I further show that on the second trial of this cause, fourteen witnesses were called on behalf of said Honolulu Plantation Company upon its case, three of whom (W. E. Sauer, J. T. Crawley and E. Ward) were called to de-

scribe the characteristics of the land sought to be condemned, and nine of whom (J. A. Low, C. Bolte, W. R. Castle, W. W. Goodale, G. Renton, F. Meyer, A. Ahrens, J. F. Margan and L. A. Thurston) were called to place valuations upon the leasehold interest of said Honolulu Plantation Company sought to be condemned in said action and two of whom (J. R. Higby and William Wagner) were called to describe the characteristics and value of the user of the buildings upon the land sought to be condemned. I further show that upon the first trial of this cause, no witnesses were recalled in rebuttal by either side, and that upon the second trial of this cause two witnesses (B. D. Pender and G. A. Howard) were called on behalf of plaintiff and petitioner in rebuttal, to describe the characteristics and value of the user of the buildings upon the land sought to be condemned, and that one witness, J. A. Low, was recalled upon this last-mentioned subject by said Honolulu Plantation Company. I further show that the evidence received upon each of said trials was substantially the same—the great mass of it was the same on both trials. And such minor differences as may have existed between the cases made by the respective parties upon said trials are hereinabove set forth, and in this behalf I show that in the above-entitled action between the same parties, upon the same pleadings, and upon the same evidence, the "full compensation" of said Honolulu Plantation Company herein "for its damages of every kind and character in this case," was formerly, to wit, on January 25th, 1902, adjudicated by said Court not to exceed the sum of $75,000.

J. J. DUNNE.

Subscribed and sworn to before me this 20th day of March, 1902.

[Seal]

W. B. MALING,
Clerk of said Court.
By Frank L. Hatch,
Deputy Clerk.

Exhibit No. 1.

[Title of Court and Cause.]

DECISION OF THE COURT ON MOTION OF PLAINTIFF FOR NEW TRIAL.

This action was brought by the United States to condemn the leasehold interest of the defendant, the Honolulu Plantation Company, in 561.2 acres of the lands desired by the United States, for a naval station.

A jury rendered a verdict therein on the 13th day of January, 1902, allowing $89,792 as the value of the leasehold in the 561.2 acres of land, and the sum of $15,208 as the value of the improvements on the said land, making a total of $105,000 for the whole interest of the defendant in the said lands.

When the verdict was rendered, both counsel for plaintiff and defendant demanded a new trial, the plaintiff following up such a demand by the proper notice of intention to move for a new trial on a day certain.

On that day the matter was submitted on briefs to be filed.

The principal question involved in the motion in the judgment of the Court is as to the verdict being excessive in amount, and not borne out by the weight of the evidence.

It is presumed that that jury intended to be controlled

in fixing the value of the leasehold interest in the lands by a preponderance of the evidence; but in the judgment of the Court they failed to do this.

I will review a few of the estimates placed upon the leasehold interests: Mr. Archer, the assessor of the Territory, and apparently a disinterested witness, placed a valuation of $25 per acre on the leasehold interest on this land. Mr. Herbert, to all intents an unwilling witness for the plaintiff, placed a valuation of from $75 to $100 per acre on the 342 acres shown by the evidence to have been cleared, and $25 per acre on the remaining 219 acres, making an average of from $54 to $71 per acre on the whole 561.2 acres.

The testimony of Mr. Low, the manager of the defendant, and who represented the defendant throughout the trial, is glaringly and curiously inconsistent. He gave five different estimates as to the value of this leasehold, four of them widely varying. In his sworn answer filed herein, he alleges that the defendant would be damaged by the taking of this land in the sum of $200,000 less $55,055 for alleged improvements on said land, placing the valuation of the leasehold in the lands alone at $144,045.

On the trial the same witness testified that the whole interest of the defendant in the leasehold in these lands was worth $400,000.

He further testified that the valuation of the land was $300 per acre without the encumbrances of the leases, but with the leases it would be worth $262 per acre, or about what the average of the estimates of Archer and Herbert would be in this case.

It further appears that in accordance with the laws of

the territory, Mr. Low, acting as the manager of the defendant, made a return to the assessor for the year 1900, in which he swore to the value of the leasehold interests of the defendant in 4,720 acres of land, including the 561.2 in controversy, at $50,000; making an average value of about $15 per acre; while for the year 1901, he returned the same leasehold interests covering a trifle more acreage amounting to 4,774 acres, and including the same 561.2 acres in controversy, at $50,000, an average of $17 per acre.

The evidence showed that a portion of these leased lands other than the 561.2 acres are now and for two years last past has been cultivated to cane and apparently are quite as valuable as the land in controversy.

It is further in evidence that these tax returns are required by law to be and were sworn to by Mr. Low representing the defendant, and it is further required by said law that these returns shall represent the actual cash value of the property. It is presumed that the defendant through its manager, Mr. Low, was swearing to the truth when these returns were made, and if so, how is this testimony on the trial to be reconciled therewith?

The compensation for this leasehold must be just, and it must be admitted that defendant should not have a judgment for more than its property is worth, and the value of the property to be taken must be fixed by the rational and usual means. This value should have been obtained by the jury from a fair and reasonable analysis of all the evidence given by the witnesses on the trial.

So the Court is largely controlled in deciding this motion by the admitted sworn statements of Mr. Low as to the value of the leasehold interests in this land at a time

when there was no reason to inflate its value. Low must have known more of the value of this leasehold than any other witness called by the defendant or by plaintiff, and courts will not permit interested parties to blow hot and cold according to their developed interests in a case at bar.

And again, it is not denied that within three years before the commencement of this case, the Dowsett lease which had then ten years to run was purchased outright by the defendant, including all rents fully paid up for the sum of $20,000. This lease then and now covering (including the 561.2 acres in controversy) some 2,900 acres of land, of which the defendant is now in possession under said lease and much of which is being cultivated.

There is no testimony that this land has ever produced any income, and while 342 acres of the 561.2 has been cleared, it has never been cultivated to cane nor has any crop ever been produced upon it. And while it may be possible to raise cane on this land or part of it with plenty of water, yet it is shallow and much of it is adobe.

The testimony of the eight witnesses called for defendant as experts, as to the value of this leasehold interest, varied in amounts from $400,000 to $239,400. In the mind of the Court, these estimates were exaggerations and were greatly in excess of any value shown to be possessed by this leasehold interest by the party chiefly in interest, the defendant, through its manager Mr. Low—they were mainly lumping estimates of the value of the property and apparently purely speculative, based upon what this land might possibly produce under given con-

ditions not shown to exist, and from a careful examination of the testimony of at least four of these witnesses (Mr. Ahrens, Mr. Goodale, Mr. Renton and Mr. Meyers, all of whom were plantation managers), it will be seen that in each instance a value is fixed upon this leasehold interest of 561.2 acres far in excess of the amount of the valuation approximately placed upon the lands on the plantation in which they were each managers, and in some of them largely interested. These latter plantations had long been cropped with cane and are all producing incomes now, while no income has ever been produced from this land nor cane grown thereon.

Neither the jury nor the Court is bound by the opinions of expert witnesses unless they are in harmony with the weight of the testimony; but it may consider them in connection with all the other facts in evidence.

In view of all of the circumstances a new trial might possibly be properly had. As has been before stated, upon the rendition of the verdict of this case, a demand for a new trial was made by both counsel for plaintiff and defendant, neither of whom was satisfied with the verdict of the jury.

However, upon a careful consideration of the reasons advanced both for and against the motion made by the plaintiff, and after a lengthy examination of the whole of the record including the testimony offered on behalf of both parties and of the able briefs filed herein, I am of the opinion that the amount of the verdict rendered by the jury is excessive and not in conformity with the weight of the evidence. The Court will not interpose its judgment in opposition to that of the jury by expressing an amount which in its opinion would be a just compensation for the property of the defendant, but

if the jury had returned a verdict in any amount not to exceed seventy-five thousand dollars, this Court would have allowed a judgment to have been entered in accordance therewith.

It is therefore the judgment of the Court that if the defendant remits from the verdict rendered in its favor thirty thousand dollars, leaving the sum of seventy-five thousand dollars as full compensation for its damages of every kind and character in this case, then the motion made by the plaintiff for a new trial will be denied. This election must be made by the defendant within three days from the date hereof by the filing with the clerk of this court a written consent to the modification of the verdict in that particular, and the entry of the judgment in accordance therewith. Otherwise a new trial will be granted.

January 25th, 1902.

(Signed) ESTEE,
Judge.

And be it further remembered that thereafter, to wit, on May 5th, 1902, said motion for said new trial was submitted on briefs to said Court for its decision; said defendant, said Honolulu Plantation Company, filing its brief on May 9th, 1902, and said plaintiff and petitioner filing its brief on May 10th, 1902.

And be it further remembered that thereafter, to wit, on May 13th, 1902, said Court made, gave and rendered its decision upon said motion for said new trial, and said decision was and is as follows, to wit:

In the United States District Court, in and for the District of Hawaii.

THE UNITED STATES OF AMERICA,
vs.
THE HONOLULU PLANTATION COMPANY (a Corporation) et al.

Opinion on Motion of Defendant for New Trial.

On the third day of March, 1902, the above case came on for the second trial before a jury. Witnesses were produced and sworn for both sides, and the case heard. On the eleventh day of March, 1902, the jury returned a verdict in favor of the complainant condemning the leasehold interest in the 561.2 acres of land as described in the bill of complaint, and also rendered a money verdict in favor of the defendant, assessing the just compensation for the said leasehold interest of the defendant in the said lands at the sum of $105,523.

On the twentieth day of March, 1902, a notice and motion for new trial was made and filed on the part of the complainant in the action. The grounds of such motion were stated generally to be the following:

1. Insufficiency of the evidence to justify the verdict.
2. That the verdict was contrary to and against the law and the evidence.

3. That said verdict is not sustained by either the law or the evidence, or the weight of the evidence herein.

4. That the said verdict is excessive in this, that it attempts to award excessive, unreasonable and inconsistent compensation or damages herein.

5. That the verdict is contrary to and against the charge of the Court herein.

6. Errors in law occurring at the trial and excepted to by the plaintiff.

An assignment of errors under each of said grounds is also specified, which it is unnecessary to herein set out.

The hearing on said motion for new trial was postponed from time to time but was finally submitted on briefs on the fifth day of May, 1902.

This case has been twice tried before a jury, the object being to fix the value of the defendants' leasehold interest in the 561.2 acres of land described in the complaint, and in both cases the verdicts were practically the same, the difference in amount being nominal.

The verdict in the first case was $105,000, and it was deemed excessive by the Court, who for that reason granted a new trial unless the defendant would accept a diminished amount; namely, $75,000. This the defendant declined to do, and the second trial was therefore had, resulting in the verdict of $102,523, as before stated. This amount the Court also believes to be excessive above the sum of $75,000, in view of all the testimony in the case as it presented itself to the mind of the Court. And while it seems to be well settled that under the law, the Court can again set the verdict aside and grant a new trial upon the same terms as in the former trial if in its discretion it sees fit to do so, yet

the consensus of the best judgment of the courts as found in the decisions is, that where no rule of law has been violated, the Court will not, after two concurring verdicts, grant a new trial if the questions to be tried depend wholly on matters of fact; although the verdict is, in the judgment of the Court, against the weight of the evidence. (Joyce vs. Charleston Ice Manufacturing Co., 50 Fed. 371-5, Clark vs. Barney Dumping Co., 109 Fed. 235.)

I might say in this case as was said by the Court in the case of Frost vs. Brown, 2 Bay. 139, where as in the case at bar two trials were had resulting practically in the same verdict, that "although I would never surrender a plain and certain rule of law to the caprice of a jury or any number of juries, yet in a case where the law is complicated with facts so that the construction and application of it must depend on the findings of facts, two concurring verdicts, even against the opinion of the judges, ought to be conclusive." (Joyce vs. Charleston Mfg. Co., supra.)

I have made an examination of the very lengthy assignment of errors of law alleged to have occurred at the trial of this case, and have read with much care the elaborate brief of the counsel for complainant, in addition to the brief of defendant's counsel. I do not deem it necessary to go into an exhaustive discussion of those alleged errors. No reason has been presented to me which I think is sufficiently forceful to lead me to change my views as indicated by my rulings at the trial; and while some slight errors may have and doubtless did creep into the record, yet I find none which in my judgment were material, or so prejudicial to the interests of

the complainant as to have materially influenced the verdict of the jury.

The motion for a new trial is therefore denied.

May 13th, 1902.

ESTEE,

Judge.

And be it further remembered that thereafter said Court made, gave, rendered and filed its judgment herein upon and pursuant to said verdict, as said judgment now appears in the files of said Court and cause; to which said judgment and to the making, giving, rendering and filing thereof and the whole thereof, said plaintiff and petitioner then and there duly excepted. (Exception No. 49.) And said plaintiff and petitioner now assigns the same as error.

Assignment and Specifications of Errors.

And now comes the above-named plaintiff and petitioner and assigns and specifies the following errors occurring at the trial of said action, to wit:

1. Particulars wherein the evidence is insufficient to justify said verdict.

(a) Said evidence is wholly insufficient to justify said verdict in this, that there is no evidence to support the finding that the market value of the leasehold interest of said Honolulu Plantation Company in the land involved herein is of the sum of $94,000, or any other sum in excess of $75,000; and in this behalf plaintiff and petitioner shows in and by the affidavit of J. J. Dunne, Esq., Assistant United States Attorney for said District, hereto attached, made a part hereof, and marked Exhibit "A," and in and by the judgment of said Court in said affidavit set out, that, in the above-entitled action be-

tween the same parties, upon the same pleadings, and upon the same evidence, the "full compensation" of said Honolulu Plantation Company herein "for its damages of every kind and character in this case," was formerly, to wit, on January 25th, 1902, adjudicated by said Court not to exceed the sum of $75,000; said "full compensation" including said market value of said leasehold interest.

(b) Said evidence is wholly insufficient to justify said verdict in this, that there is no evidence to support the finding that the market value of all improvements upon the property condemned in the above-entitled action is of the sum of $8,523, or any other sum; and in this behalf plaintiff and petitioner shows in and by the affidavit of J. J. Dunne, Esq., Assistant United States Attorney for said District, hereto attached, made a part hereof and marked Exhibit "A," and in and by the judgment of said Court in said affidavit set out, that, in the above-entitled action between the same parties, upon the same pleadings, and upon the same evidence, the "full compensation" of said Honolulu Plantation Company herein for "its damages of every kind and character in this case," was formerly, to wit, on January 25th, 1902, adjudicated by said Court not to exceed the sum of $75,000.

(c) The evidence is wholly insufficient to justify said verdict in this, that it wholly fails to show that said Honolulu Plantation Company is entitled to receive as compensation *of* damages for the taking and condemnation of their leasehold interests in the land involved in the above-entitled action, any sum whatever in excess of $75,000.

(d) The evidence is wholly insufficient to justify said verdict in this, that it wholly fails to show that said

Honolulu Plantation Company is entitled to receive as compensation or damages for the taking and condemnation of improvements upon said land—any sum whatever.

(e) Said evidence is wholly insufficient to justify said verdict in this, that it wholly fails to show any value of said leasehold interest in excess of $75,000.

(f) Said evidence is wholly insufficient to justify said verdict in this, that it wholly fails to show either the existence upon the land condemned herein of any improvements, or the market value, if any, of such improvements.

2. Particulars in which said verdict is contrary to and against the law and the evidence.

(a) Said verdict is contrary to and against the law and the evidence in this, that it was made, given and rendered by a jury.

(b) Said verdict is contrary to and against the law and the evidence, because of errors of law occurring during the trial and excepted to by plaintiff and petitioner; and plaintiff and petitioner hereby makes express reference to the detail specifications herein included in the assignment of errors under the paragraph No. 6, hereinafter set forth, and makes them and each of them part and parcel of this specification.

(c) Said verdict is contrary to and against the law and the evidence, because of the insufficiency of the evidence to justify said verdict, and said plaintiff and petitioner hereby makes express reference to the detail specifications herein included in the assignment of errors under the paragraph No. 1, last hereinbefore set forth, and makes them and each of them part and parcel of this specification.

(d) Said verdict is contrary to and against the law and the evidence, because of its finding that the market value of the leasehold interests of said Honolulu Plantation Company in the land herein condemned is of the sum of $94,000, or any other sum whatever in excess of $75,000.

(e) Said verdict is contrary to and against the law and the evidence, because of its finding that the value of all improvements upon the property condemned in the above-entitled action is of the sum of $8,523, or any other sum whatever.

(f) Said verdict is contrary to and against the law and the evidence, because as shown in and by the affidavit of J. J. Dunne, Esq., Assistant United States Attorney for said District, hereto attached, made a part hereof, and marked Exhibit "A," and in and by the judgment of said Court in said affidavit set out, it appears that in the above-entitled action between the same parties, upon the same pleadings and upon the same evidence, the "full compensation" of said Honolulu Plantation Company herein "for its full damages of every kind and character in this case," was formerly, to wit, on January 25th, 1902, adjudicated by said Court not to exceed the sum of $75,000.

3. Particulars in which said verdict is not sustained or justified by either the law or the evidence or the weight of the evidence.

(a) Said verdict is not sustained or justified by either the law or the evidence or the weight of the evidence herein, because said verdict is contrary to and against the law and the evidence in this, that it was made, given and rendered by the jury.

(b) Said verdict is not sustained or justified by either the law or the evidence or the weight of the evidence herein, because of errors of law occurring during the trial and excepted to by plaintiff and petitioner; and plaintiff and petitioner hereby makes express reference to the detail specifications herein included in the assignment of errors under paragraph No. 6, hereinafter set forth, and makes them and each of them part and parcel of this specification.

(c) Said verdict is not sustained or justified by either the law or the evidence or the weight of the evidence, herein, because of the insufficiency of the evidence to justify said verdict; and said plaintiff and petitioner hereby makes express reference to the detail specifications herein included in the assignment of errors under the aforesaid paragraph No. 1, last hereinabove set forth, and makes them and each of them part and parcel of this specification.

(d) Said verdict is not sustained or justified by either the law or the evidence or the weight of the evidence herein, because of its finding that the market value of the leasehold interest of said Honolulu Plantation Company in the land herein condemned is of the sum of $94,000 or any other sum whatever in excess of $75,000.

(e) Said verdict is not sustained or justified by either the law or the evidence or the weight of the evidence herein, because of its finding that the value of all improvement upon the property condemned in the above-entitled action is of the sum of $8,523, or any other sum whatever.

(f) Said verdict is not sustained or justified by either the law or the evidence or the weight of the evidence

herein, because as shown in and by the affidavit of J. J. Dunne, Esq., Assistant United States Attorney for said District, hereto attached, made a part hereof, and marked Exhibit "A," and in and by the judgment of said Court in said affidavit set out, it appears that in the above-entitled action between the same parties upon the same pleadings and upon the same evidence, the "full compensation" of said Honolulu Plantation Company herein "for its damages of every kind and character in this case," was formerly, to wit, on January 25th, 1902, adjudicated by said Court not to exceed the sum of $75,000.

4. Particulars in which said verdict is excessive.

(a) That said verdict is excessive in this, that it attempts to award excessive, unreasonable and inconsistent compensation or damages herein.

(b) The compensation or damages attempted to be awarded by said verdict of said jury, is excessive, unreasonable and inconsistent, in this, that the amount attempted to be awarded by said verdict as compensation or damages for the taking of the alleged improvements claimed to have been upon the land sought to be condemned herein, was and is grossly and unreasonably excessive, without the evidence, and with no evidence to support it; it not appearing in the evidence either that any improvements were upon the land sought to be condemned or what, if any, was the market value thereof.

(c) The compensation or damages attempted to be awarded by said verdict of said jury, is excessive, unreasonable and inconsistent in this, that the amount attempted to be awarded by said verdict as compensation or damages for the taking of the leasehold interest

claimed in the land sought to be condemned by said Honolulu Plantation Company was and is grossly and unreasonably excessive, without the evidence, with no evidence to support it, and against the evidence in the case.

(d) The compensation or damages attempted to be awarded by said verdict of said jury, is excessive, unreasonable and inconsistent in this, that as shown in and by the affidavit of J. J. Dunne, Esq., Assistant United States Attorney for said District, hereto attached and made a part hereof, and marked Exhibit "A," and in and by the judgment of said Court in said affidavit set out, it appears that, in the above-entitled action between the same parties upon the same pleadings and upon the same evidence, the "full compensation" of said Honolulu Plantation Company herein "for its damages of every kind and character in this case," was formerly, to wit, on January 25th, 1902, adjudicated by said Court not to exceed the sum of $75,000.

5. Particulars in which said verdict is contrary to and against the charge of the Court.

(a) In arriving at said verdict, said jury failed to consider said testimony as a whole, or fairly to weigh all the testimony both direct and indirect, and with all reasonable inferences to be drawn therefrom; but, on the contrary, limited its consideration to isolated portions of said testimony.

(b) In arriving at said verdict, said jury failed to consider the fair market value of the property involved at the time of the taking, to wit, on July 6th, 1901, in its then actual condition.

(c) In arriving at said verdict, said jury was neither

guided nor governed by the preponderance of the evidence.

(d) In arriving at said verdict, said jury considered the mere speculative or possible value and not market value.

(e) In arriving at said verdict, said jury was neither guided nor governed by the amount of the just compensation to be awarded to the defendant herein for the taking of its property.

(f) In arriving at said verdict, said jury gave undue and excessive weight to the expert testimony introduced by said defendant.

6. Particulars of the errors in law occurring during the trial, and excepted to by said plaintiff and petitioner.

(a) Said Court erred in overruling the objections of said plaintiff and petitioner to the claim and demand of said defendant, said Honolulu Plantation Company, for a trial of said cause before a jury of the country, and in granting said claim and demand, and in permitting and ordering said cause and said issues to be tried before a jury of the country. (Exception No. 1.)

(b) Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked on cross-examination from the witness U. S. G. White: "Now, do you know whether there is a mill belonging to the plantation a mile above this land?" (Exception No. 2.)

(c) Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked on cross-examination from the witness U. S. G. White: "And that it stands now where it stood on the 6th of July, 1901?" (Exception No. 3.)

(d) Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked on cross-examination from the witness U. S. G. White: "What was the size, Captain, of that mill?" (Exception No. 4.)

(e) Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked on cross-examination from the witness U. S. G. White: "How far is this Halawa Valley that you have testified about in your first answer that I asked in regard to it from the land in question—the nearest portion to the land in question?" (Exception No. 5.)

(f) Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked on cross-examination from the witness J. W. Pratt: "Now, Mr. Pratt, how is this return made up? What kind of a return is under the law?" (Exception No. 6.)

(g) Said Court erred in overruling the objections by plaintiff and petitioner to the following question asked on cross-examination from the witness F. K. Archer: "Now, Mr. Archer, do you know what that land is capable of yielding in sugar?" (Exception No. 7.)

(h) Said Court erred in denying to said plaintiff and petitioner an opportunity to state its objections to the following question asked on cross-examination from the witness F. K. Archer: "Do you know whether the Honolulu Plantation Company had on the 6th of July, 1901, a water supply that was immediately available to this land in question?" (Exception No. 8.)

(i) Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked on cross-examination from the witness F. K. Archer:

"What was the extent of that water supply?" (Exception No. 9.)

(j) Said Court erred in denying the motion of plaintiff and petitioner to strike out the answer and testimony given by said witness F. K. Archer on cross-examination in response to the question: "What was the extent of that water supply?" (Exception No. 10.)

(k) Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked on cross-examination from the witness F. K. Archer: "Do you know *whether is a flowing* stream immediately available for use upon this land within the lines of the Honolulu Plantation Company?" (Exception No. 11.)

(l) Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked on cross-examination from the witness F. K. Archer: "Well, now, assuming that the land is in the same condition—or substantially the same condition on the 6th day of July, 1901, and considering its situation and the uses it might be put to, and the improvements put upon it, the plowing that has been done, the clearing that has been done, all of its usefulness, the whole property of the Honolulu Plantation Company that is available for use in connection with that land, assuming those things —what do you say as to the value of the leasehold interest?" (Exception No. 12.)

(m) Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked on cross-examination from the witness F. W. Thrum: "Now, Mr. Thrum, how do you know what this land will

produce, or whether it is good cane land or not?" (Exception No. 13.)

(n) Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked on cross-examination from the witness F. W. Thrum: "Do you know the yield of the Halawa Valley?" (Exception No. 14.)

(o) The Court erred in sustaining the objections of said defendant, said Honolulu Plantation Company to the following question asked by said plaintiff and petitioner from the witness F. W. Thrum: "If a leasehold interest of forty years on that particular piece of land, seven years of which was fully paid up, the balance of which was held at three and one-half per cent of the sugar produced, provided it did not fall below $400,000 per annum for the entire tract of land, including other lands, the first lease including 2,900 acres, and the second 2,122 acres, if such a leasehold were offered for sale in the public market—what would you be willing to pay per acre for it?" (Exception No. 15.)

(p) Said Court erred in granting the motion of said defendant, said Honolulu Plantation Company, to strike out from the testimony of the witness F. W. Thrum, the following passage: "I stated that part of my occupation on the Ewa plantation was the selection of cane land. The first case was in 1896, when Mr. Lowrie was the manager, and many acres were valuable for the cultivation of cane below field 19—that was then the extent of the plantation in that direction. I was sent out there, and started at field 19, and I cut lines through the algeroba, the glue and the lantana, and was to report the land that I considered valuable for sugar cane, and

after two or three weeks later I got around this tract, field 19, and reported to him the number of acres that I considered valuable for sugar cane in that vicinity. My report was accepted." (Exception No. 16.)

(q) Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked on cross-examination from the witness J. A. McCandless: "What is the value set on that leasehold interest of 142 acres referring to a certain tract of 142 acres on Ford Island, originally sought to be condemned in this action, but to which a discontinuance of the action was subsequently made and filed by plaintiff and petitioner and ordered by the Court?" (Exception No. 17.)

(r) Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked on direct examination from the witness, J. A. Low: "Just explain the nature of your duties and the nature of your experience and the nature of your study on the subject of the growth and manufacture of sugar?" (Exception No. 18.)

(s) Said Court erred in overruling the objection of plaintiff and petitioner to the following question asked on direct examination from the witness, J. A. Low: "Why not—that is to say—why was not sugar grown on this land by the Honolulu Plantation Company?" (Exception No. 19.)

(t) Said Court erred in denying the motion of plaintiff and petitioner to strike out the answer and testimony given by the witness, C. Bolte on direct examination in response to the question," now, considering the property sought to be condemned in the state in which you saw it it on the day that you viewed it, that it is in substan-

tially the same state on the 6th of July, 1901, considering its situation and the uses that might be made of it and to which it was adapted, and assuming that the plantation has a thirty-nine years' lease, seven years' rental of which has been paid, and the remaining thirty-two years is upon the basis of a crop payment, that is, three and one-half per cent of the sugar produced, and the payment of the taxes, the lease including other land, the minimum rent upon the other land which is not material, and assuming that the 342 acres of cane land in the area sought to be condemned—what in your opinion was the value of the leasehold interest of that land on the 6th of July, 1901, to the Honolulu Plantation Company?" (Exception No. 20.)

(u) Said Court erred in denying the motion of plaintiff and petitioner to strike out the testimony of said witness, C. Bolte, given on direct examination relative to the value of this leasehold to a particular individual—to the Honolulu Plantation Company. (Exception No. 21.)

(v) Said Court erred in denying the motion of plaintiff and petitioner to strike out the answer and testimony of the witness, J. A. Low, during his direct examination, when resumed, in response to the question: "What was the value of the use of the buildings upon that land for the remainder of your term of the lease?" (Exception No. 22.)

(w) Said Court erred in denying the motion of plaintiff and petitioner to strike out the testimony of the witness, J. A. Low, on direct examination, when resumed relative to the value of buildings upon the land sought to be condemned to the Honolulu Plantation Company." (Exception No. 23.)

(x) Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked on direct examination from the witness, J. A. Low: "What was its (the property sought to be condemned) value on the 6th of July, 1901?" (Exception No. 24.)

(y) Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked by said Honolulu Plantation Company from the said witness, J. A. Low, during his direct examination, when resumed: "Mr. Low, that portion of the tax return read in evidence here, showing the statement under the heading 'Leasehold Interest—return of Real Estate Leases as per schedule "B," $50,000'—what have you to say in regard to it, Mr. Low, by way of explanation?" (Exception No. 25.)

(z) Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked by said Honolulu Plantation Company from the witness, W. R. Castle on direct examination: "What knowledge have you of the development of the plantation in that district (meaning the District of Ewa)?" (Exception No. 26.)

(aa) Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked by said Honolulu Plantation Company from said witness, W. R. Castle, on direct examination: "Now, Mr. Castle, considering the property sought to be condemned, the state which you saw it on the day which you viewed, it, and assuming that it was in substantially the same state on July 6th. 1901, and taking into consideration the situation of the land and all the uses that might be made of it, and assuming that the plantation has a thirty-

nine years' lease, and that seven years' rental has been paid, and that the rental for thirty-two years is on the basis of three and one-half per cent of the sugar produced, and the payment of taxes (the lease covering other lands in addition to this), and for a minimum rental, and assuming that 342 acres of cane land of the land sought to be condemned—what in your opinion was the market value of the leasehold on the 6th of July, 1901?" (Exception No. 27.)

(bb) Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked by said Honolulu Plantation Company from the witness, W. W. Goodale, on direct examination: "Now, Mr. Goodale, considering this land sought to be condemned, in the state in which you saw it on the day that you viewed it, and assume that it is in substantially the same state or was on the 6th of July last year, and considering the situation of it and the uses that might be made of the land and to which it was adapted, and assuming that the plantation had a thirty-nine years' lease, seven years' rental of which has been paid, the rental for 32 years is based upon three and one-half per cent of the sugar produced (the particular lease covers other land as well as this), has a minimum basis of rental and includes other land, and assume that there is 342 acres of cane land—what in your opinion is the market value of the leasehold the Honolulu Company of the land sought to be condemned on the 6th of July last?" (Exception No. 28.)

(cc) Said Court erred in overruling the objection of plaintiff and petitioner to the following question asked by said Honolulu Plantation Company from the witness, G. F. Renton, on direct examination: "Now, consider-

ing this property sought to be condemned in the state that you saw it on that day that you viewed it, and assuming that it is in substantially the same situation on the 6th of July, 1901, and assuming that there is a lease for thirty-nine years, seven years of which has been paid up, and the rental for thirty-two years is on the basis of three and a half per cent of the sugar produced—(the lease covers other land as well as this), has a minimum rental which, however, has no materiality to the question—the payment of taxes and considering all the uses and purposes to be made of the land and the situation in which it exists on that day, and assuming, further, that there was 342 acres of cane land within the area sought to be condemned—what in your opinion was the market value of the leasehold interest of the Honolulu Plantation Company on the 6th day of July, last year?" Exception No. 29.)

(dd) Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked by said Honolulu Plantation Company from the witness, F. Meyer, on direct examination: "Well, considering the property sought to be condemned as to its location and all the uses that could be made of it, and assuming that it is substantially in the same situation as it was on the 6th day of July, 1901, and assuming that there is a lease of thirty-nine years, seven years of which are paid up, and thirty-two years of which are on the basis of three and one-half per cent of the sugar produced, together with the payment of taxes, and also saying that there is a minimum rental, that this three and one-half per cent should not be less than $4,000 a year, and assuming that there are 342 acres of cane land in the area

sought to be condemned—what in your opinion was the market value of that leasehold interest on the 6th of July, 1901?" (Exception No. 30.)

(ee) Said Court erred in overruling the objection of plaintiff and petitioner to the following question asked by said Honolulu Plantation Company from the witness, A. Ahrens, on direct examination: "Now, considering the property sought to be condemned, and in the same space in which you saw it on the day that you viewed, that is, in October; and assuming that it was in substantially the same situation that it was on July 6th, 1901, and after taking into consideration the use that might be made, the purpose to which it is adapted, and assuming that there is a thirty-nine years' lease, seven years' of which are paid up, and the balance of the term is upon the basis of a three and one-half per cent of the stock, and I will also state for your information that there is a minimum basis in which includes other land, now, assuming that there was 342 acres of cane land included within the 561 acres—what in your opinion was the market value of the leasehold interest on the 6th of July, last?" (Exception No. 31.)

(ff) Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked by said Honolulu Plantation Company from the witness, J. T. Crawley, on direct examination: "What do you know about the productive capacity of the soil of this land?" (Exception No. 32.)

(gg) Said Court erred in overruling the objection of plaintiff and petitioner to the following question asked by said Honolulu Plantation Company from the witness, J. F. Morgan, on direct examination: "Now, Mr. Morgan,

taking into consideration the property sought to be condemned and its location and situation and what can be done with the situation as you saw it on the day that you viewed it, the uses and purposes that the land can be put to, and assuming that the Honolulu Plantation Company has a thirty-nine years' lease, seven years' of which were paid up and the balance of the term is based upon three and one-half per cent of the sugar produced from the land. the lease also covering other lands, having a rental basis, and assuming that there was 342 acres of cane land upon the land sought to be condemned—what would you say was the market value of that leasehold interest on the 6th of July, 1901?" (Exception No. 33.)

(hh) Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked by said Honolulu Plantation Company from the said witness, J. F. Morgan, on redirect examination: "How many mills are there in the vicinity of this land?" (Exception No. 34.)

(ii) Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked by said Honolulu Plantaton Company from the witness, L. A. Thurston, on direct examination: "Now, considering the property sought to be condemned, Mr. Thurston, was in the same state in which you saw it on the day that you viewed it last, and assuming that it was in substantially the same state and condition on the 6th of July, 1901, and taking into consideration the location of the land and of the uses to which it might be put, and to which it was adapted, and assuming the plantation has thirty-nine years' lease, seven years' rental of

which is paid up, and the rental for thirty-two years thereof is on a basis of three and one-half per cent of the sugar produced, and the payment of taxes (I will say that the leasehold covers other land, and has a minimum rental of $4,000 covering practically 2,000 acres), and assuming that there was 342 acres of cane land in the area sought to be condemned, what is your opinion of the market value of that leasehold interest on the 6th of July, 1901?" (Exception No. 35.)

(jj) Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked by said Honolulu Plantation Company from said witness, L. A. Thurston, on redirect examination: "What can you say as to the quality of the soil on the land sought to be condemned as to its producing any crop of sugar?" (Exception No. 36.)

(kk) Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked by said Honolulu Plantation Company from the witness, J. R. Higby, on direct examination: "Are you able to state the use of those buildings for the term of thirty-nine years?" (Exception No. 37.)

(ll) Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked by said Honolulu Plantation Company from said witness, J. R. Higby, on direct examination: "Assuming that their life will be finished, what is the value of those buildings?" (Exception No. 38.)

(mm) Said Court erred in refusing to give to said jury the first instruction requested by said plaintiff and petitioner. (Exception No. 39.)

(nn) Said Court erred in refusing to give to said jury

the second instruction requested by said plaintiff and petitioner. (Exception No. 40.)

(oo) Said Court ererd in refusing to give to said jury the fourth instruction requested by said plaintiff and petitioner. (Exception No. 41.)

(pp) Said Court erred in refusing to give to said jury the fifth instruction requested by said plaintiff and petitioner. (Exception No. 42.)

(qq.) Said Court erred in refusing to give to said jury the sixth instruction requested by said plaintiff and petitioner. (Exception No. 43.)

(rr) Said Court erred in refusing to give to said jury the seventh instruction requested by said plaintiff and petitioner. (Exception No. 44.)

(ss) Said Court erred in refusing to give to said jury the eighth instruction requested by said plaintiff and petitioner. (Exception No. 45.)

(tt) Said Court erred in refusing to give to said jury the ninth instruction requested by said plaintiff and petitioner. (Exception No. 46.)

(uu) Said Court erred in permitting to be rendered, and in receiving the verdict herein. (Exception No. 47.)

(vv) Said Court erred in its ruling and in the whole thereon denying the motion for a new trial herein, made by said plaintiff and petitioner. (Exception No. 48.)

(ww) Said Court erred in making, giving, rendering and filing its judgment herein upon and pursuant to said verdict. (Exception No. 49.)

And be it further remembered that the above and foregoing bill of exceptions is a full, true and correct statement of all the evidence in the cause and also and in addition thereto, a full, true and correct statement of all

objections, rulings, exceptions relied on by plaintiff and petitioner, instructions requested by plaintiff and petitioner, charge of the Court, and other proceedings in and upon the above-entitled cause and said trial, and that no other or different evidence, objections, rulings, exceptions relied on by plaintiff and petitioner, instructions requested by plaintiff and petitioner, charge of the Court, or other proceedings were had in or upon the above-entitled cause or said trial.

And now, within due time, said plaintiff and petitioner presents and tenders this, its said bill of exceptions to said Court, and in order that said exceptions may be preserved and perpetuated, and in furtherance of justice and that right may be done, said plaintiff and petitioner presents the foregoing as its bill of exceptions herein, and prays that the same may be settled, approved and allowed, and signed and certified as provided by law.

Dated Honolulu, Hawaii, May 31st, 1902.

THE UNITED STATES OF AMERICA,
Plaintiff and Petitioner,
By R. W. BRECKONS,
United States Attorney, and
J. J. DUNNE,
Assistant United States Attorney,
Attorneys for Plaintiff and Petitioner.

The foregoing bill of exceptions, having been brought on regularly before the above-entitled Court on this 9th day of July, 1902, upon the application of the above-named plaintiff and petitioner for the settlement and certification thereof:

Now, therefore, on motion of R. W. Breckons, United States Attorney for said District, and J. J. Dunne, Assistant United States Attorney for said District, it is hereby ordered that the foregoing bill of exceptions heretofore filed by said plaintiff and petitioner in this cause, as the same now stands, be, and the same is hereby settled, approved and allowed, as a true bill of exceptions

herein, and that the same as so settled, approved and allowed be now and here certified accordingly by the undersigned, the Judge of said court presiding herein, and who presided in said cause since its commencement; and that said bill of exceptions, when so certified to, be filed by the clerk of said Court.

Dated Honolulu, Hawaii, July 9th, 1902.

MORRIS M. ESTEE,
Judge of said Court.

[Endorsed]: Title of Court and Cause. Bill of Exceptions. Filed May 31st, 1902, at 11:30 o'clock A. M. W. B. Maling, Clerk.

In the District Court of the United States, in and for the District of Hawaii.

THE UNITED STATES OF AMERICA,
Plaintiff and Petitioner,
vs.
HONOLULU PLANTATION COMPANY (a Corporation), et al.,
Defendants and Respondents.

Stipulation.

In the above-entitled cause, it is hereby stipulated between the respective parties that the bill of exceptions heretofore filed by said respective parties be presented for settlement as of this day, June 4th, 1902, notwithstanding any previous notice.

J. J. DUNNE,
Assistant United States Attorney,
Counsel for Plaintiff.
HATCH & SILLIMAN,
Counsel for Defendant.

Order of Court.

In the above-entitled matter, it is hereby ordered that counsel for the above-named parties examine said bill of exceptions and agree as to so much thereof as they may be advised; and should said counsel be unable to agree, then on Monday, June 9th, 1902, at 10 o'clock A. M., they shall report to said Court for adjustment and settlement any matters as to which they may not be able to agree.

Dated Honolulu, Hawaii, June 4th, 1902.

MORRIS M. ESTEE,
Judge of said Court.

[Endorsed]: Title of Court and Cause. Filed June 4th, 1902. W. B. Maling, Clerk. By Frank L. Hatch, Deputy Clerk.

In the District Court of the United States, in and for the District of Hawaii.

THE UNITED STATES OF AMERICA,
Plaintiff and Petitioner,
vs.
HONOLULU PLANTATION COMPANY (a Corporation), et al.,
Defendants and Respondents.

Motion to Amend Plaintiff's Bill of Exceptions.

Comes now the Honolulu Plantation Company, defendant above named, and moves this Honorable Court that the bill of exceptions of the United States of America, plaintiff above named, filed in the above-entitled cause, and dated the 31st day of May, 1902, be amended in the following particulars, to wit:

First.—By striking out the first exception in said bill of exceptions contained, said exception relating to a demand for and the granting of a jury trial in said cause, upon the ground that no such exception was taken by the said plaintiff.

Second.—By striking out the forty-eighth exception in said bill of exceptions contained, being the exception taken by the said plaintiff to the ruling of the Court denying the motion for a new trial, upon the ground that the granting or denying of such motion for a new trial is not the proper subject of exception herein.

Third.—By striking out all of that portion of said bill of exceptions contained in the paragraph on page 222 thereof, wherein it is stated that said bill of exceptions is a full, true and correct statement of all the evidence and the objections, rulings and exceptions, etc., and that no other or different evidence, objections, etc., or other proceedings, were had in or upon the above-entitled cause or said trial, upon the ground that such statements so contained in said paragraph do not conform to the actual facts.

This motion is based upon all of the files and records in said cause, together with the transcript of testimony therein as reported by the official stenographer of said Court.

HATCH & SILLIMAN,
Attorneys for Defendant, the Honolulu Plantation Company.

I hereby admit the physical receipt of a copy of the above, this June 9, 1902, reserving all objections.

J. J. DUNNE,
Assistant United States Attorney.

[Endorsed]: Title of Court and Cause. Motion. Filed June 9th, 1902. W. B. Maling, Clerk. By Frank L. Hatch, Deputy Clerk.

United States of America,
Territory of Hawaii.

In the District Court of the United States, in and for the Territory of Hawaii.

THE UNITED STATES OF AMERICA,
Plaintiff and Petitioner,
vs.
HONOLULU PLANTATION COMPANY (a Corporation), et al.,
Defendants and Respondents.

Stipulation.

In the above-entitled matter it is hereby stipulated and agreed that, with the consent and approval of said Court, the further hearing of the settlement of the respective bill of exceptions therein be continued until Monday, the 23d day of June, 1902.

Dated Honolulu, Hawaii, June 16th, 1902.

J. J. DUNNE,
Attorney for Plaintiff and Petitioner.
HATCH & SILLIMAN and
FRED W. MILVERTON,
Attorneys for Defendant and Respondent.

[Endorsed]: Title of Court and Cause. Filed June 16th, 1902. W. B. Maling, Clerk. By Frank L. Hatch, Deputy Clerk.

United States of America,
District of Hawaii.

In the District Court of the United States, in and for the District of Hawaii.

THE UNITED STATES OF AMERICA,
Plaintiff and Petitioner,
vs.
HONOLULU PLANTATION COMPANY (a Corporation), et al.,
Defendants and Respondents.

Supplemental Bill of Exceptions.

Be it remembered, that heretofore, and within due time, the above-named plaintiff and petitioner prepared, served, filed and presented for settlement upon its proposed bill of exceptions in the above-entitled cause. Upon the presentation of said bill to said Court for settlement, the above-named defendant objected to the exceptions therein contained, numbered, respectively, Exceptions 1 and 48.

Said Exception 1, as contained in said bill, was as follows, to wit:

"And be it further remembered that on September 20th, 1901, said defendant filed in said Court and with the clerk thereof its claim and demand for a trial in this cause before a jury of the country, and moved said Court that said cause be placed upon the jury calendar of said Court for the October term, 1901, or such other term as may be determined by said Court. Said claim and demand was then and there duly objected to, resisted and denied by the above-named plaintiff and petitioner, upon

the grounds that said claim and demand was and is contrary to the law, wholly unauthorized and illegal in proceedings for the taking of private property for public purposes, without warrant or authority of law or sanction or requirement of law under the constitution and laws of the United States, without warrant or authority of law or sanction or requirement of law under the constitution and laws of the Territory of Hawaii, or any or either of the aforesaid constitutions or laws, and wholly unauthorized and unjustified by any of the established principles of jurisprudence applicable thereto.

"And be it further remembered that thereafter, on October 10th, 1901, the hearing by said Court of said claim and demand for said jury trial came on regularly; and after argument thereon by counsel, said claim and demand was submitted to, and was taken under advisement by said Court for decision. And thereafter, to wit, on October 17th, 1901, the aforesaid matter of said claim and demand for said jury trial came on regularly for decision by said Court; and said Court then and there ordered that the case of, and the issues tendered and joined by, said defendant above named, to wit, Honolulu Plantation Company (a Corporation), one of the above-named defendants and respondents, be tried by and before a jury of the country, as claimed and demanded by said defendant; to which said order of said Court, and to the whole thereof, said plaintiff and petitioner then and there duly excepted, and now assigns the same, and the whole thereof as error. (Exception No. 1.) And said plaintiff and petitioner now assigns said ruling as error."

Said defendant objected to the allowance of said Ex-

ception No. 1 upon the ground that no such exception had been taken by said plaintiff and petitioner.

Said plaintiff and petitioner then offered in evidence, and the same was received and read in evidence, the following extracts from the minutes of said Court relating to said matter:

"Thursday, October 10th, 1901.

Court met pursuant to adjournment—Present: Honorable MORRIS M. ESTEE, District Judge, Presiding. Walter B. Maling, Clerk.

UNITED STATES
vs.
ESTATE OF B. P. BISHOP, Deceased, et al. } No. 3.

The hearing of this cause came up on a motion and demand for a jury trial, heretofore filed in this court by each of the defendants in the above-entitled case. The Assistant United States Attorney, J. J. Dunne, Esq., appearing on behalf of the United States, and F. M. Hatch, Esq., and S. M. Ballou, Esq., appearing for the said defendants, and after argument by counsel the matter was submitted and was taken under advisement by the Court for decision.

It was then ordered that the Court adjourn until tomorrow morning at 10 o'clock." (Vol. 1, Minutes of said Court, p. 398.)

And thereupon said plaintiff and petitioner then offered in evidence, and the same was received and read in evidence, the following extracts from the minutes of said court relating to said matter:

"Thursday, October 17th, 1901.

Court met pursuant to adjournment—Present, Honorable MORRIS M. ESTEE, District Judge, Presiding. Walter B. Maling, Clerk.

THE UNITED STATES

vs.

ESTATE OF B. P. BISHOP, Deceased, et al. } No. 3.

This cause came on regularly for hearing at this time for a decision by the Court on a motion and demand for a jury trial heretofore filed by each of the defendants in this case, J. J. Dunne, Esq., Assistant United States Attorney, appearing for the United States and R. D. Silliman, Esq., W. A. Stanley, Esq., and S. M. Ballou, Esq., appearing on behalf of the above-named defendants; and the Court ordered that the case of the defendant, Estate of Bernice Pauahi Bishop, deceased, and Joseph O. Carter, William F. Allen, William O. Smith, Samuel M. Damon and Alfred W. Carter, trustees under the will of Bernice Pauahi Bishop, deceased, and of the estate of said Bernice Pauahi Bishop, deceased, be set for the fourth Monday in November, 1901, at 10 o'clock A. M., to be tried by a jury in that case.

To which order allowing a jury in this case, the Assistant United States Attorney, on behalf of the United States, duly excepted, and asked for ten days' time within which to file a bill of exceptions, which request was granted by the Court.

It was further ordered that the cases of all of the other defendants in this matter be continued until the fourth Monday of November, 1901.

It was then ordered that Court adjourn until to-morrow morning at 10 o'clock." (Vol. 1, Minutes of said Court, p. 409.)

And be it further remembered that said F. M. Hatch, Esq., and R. D. Silliman, Esq, during all the times herein mentioned, were counsel of and for the Honolulu Plantation Company, a corporation, one of the defendants in said minutes referred to; and that W. A. Stanley, Esq, above mentioned, during all the times herein mentioned was counsel of and for Bishop and Company, a copartnership, and also counsel of and for estate of Bernice Pauahi Bishop, deceased, and the trustees of said estate, two of the other defendants in said minutes referred to; and that S. M. Ballou, Esq., above referred to, during all the times mentioned herein, was one of the counsel of and for said estate of Bernice Pauahi Bishop, deceased, and the trustees thereof, one of the defendants in said minutes referred to.

And be it further remembered that thereafter, and within due time, said plaintiff and petitioner prepared, served and filed its bill of exceptions to the above-mentioned order of said Court, and said Court, on October 26, 1901, settled, allowed, approved and certified said bill of exceptions.

And be it further remembered that each and all of the foregoing facts and matters were then and there duly called to the attention of said Court; but notwithstanding the same, said Court sustained said objection of said defendant, and disallowed and rejected said Exception No. 1; to which said ruling of said Court, said plaintiff and petitioner then and there duly excepted, and now assigns the same as error. (Exception No. 1.)

Said Exception No. 48, as contained in said bill of exceptions was the exception of said plaintiff and petitioner to the order of said Court denying plaintiff's and petitioner's motion for a new trial of said action. Within due time, said plaintiff and petitioner prepared, served and filed its motion for a new trial of the above-entitled action as to the issues therein joined between it and said Honolulu Plantation Company, one of the defendants above referred to and said motion for said new trial is fully set out in the bill of exceptions herein and is hereby referred to and made a part hereof. Said motion for a new trial was thereafter argued and submitted to said Court; and thereafter on May 13th, said Court denied said motion upon the grounds stated in its written opinion, a true copy of which appears in the aforesaid bill of exceptions, and is hereby referred to and made a part hereof, and to said ruling of said Court, and to the whole thereof, denying said motion for a new trial, said plaintiff and petitioner then and there duly excepted; and in said bill of exceptions assigned said ruling and the whole thereof as error, said exception being numbered Exception No. 48 in said bill of exceptions.

Said defendant objected to the allowance of said exception No. 48, upon the ground that said order of said Court denying said motion for a new trial was not the subject of the exception because not reviewable on appeal. Said plaintiff and petitioner then and there called the attention of the Court, within the rule laid down in Felton vs. Spiro, 78 Fed. Rep. 576, to its, said plaintiff and petitioner's, rights, to have the Court, upon said motion for new trial, weigh all the evidence, and exercise its discretion to say whether or not, in its opinion,

the verdict was so opposed to the weight of the evidence that a new trial should be granted; and further called the attention of the Court to the fact that nowhere in the opinion of said Court denying said motion for new trial was said right accorded to said plaintiff and petitioner, but the contrary.

And be it further remembered that each and all of the foregoing matters were then and there duly called to the attention of said Court; but notwithstanding the same, said Court sustained said objection of said defendant, and disallowed and rejected said exception No. 48; to which said ruling of said Court, said plaintiff and petitioner then and there duly excepted, and now assigns the same as error. (Exception No. 2.)

And be it further remembered that said plaintiff and petitioner then and there duly applied to said Court for time within which to prepare, present and file its bill of exceptions herein to said orders of said Court; and said Court then and there allowed said time; and said plaintiff and petitioner now, within said time, presents and tenders this, its bill of exceptions to said orders of said Court, to said Court; and in order that said exceptions may be preserved and perpetuated, and in furtherance of justice and that right may be done, and that the rulings here complained of may be presented to the Appellate Court for its opinion and decision, said plaintiff and petitioner now presents the foregoing as its bill of exceptions herein, and prays that the same may be settled, approved and allowed, and signed and certified as provided by law.

Dated, Honolulu, Hawaii, June 30th, 1902.

THE UNITED STATES OF AMERICA,
Plaintiff and Petitioner.
R. W. BRECKONS,
United States Attorney, and
J. J. DUNNE,
Assistant United States Attorney, Attorneys for Plaintiff and Petitioner.

Order Settling and Certifying Bill of Exceptions.

The foregoing bill of exceptions having been brought on regularly before the above-entitled court on the —— day of June, 1902, upon the application of the above-named plaintiff and petitioner for the settlement and certification thereof:

Now, therefore, on motion of R. W. Breckons, United States Attorney for said District, and J. J. Dunne, Assistant United States Attorney for said District, it is hereby ordered that the foregoing bill of exceptions heretofore filed by said plaintiff and petitioner in this cause, as the same now stands, be, and the same is hereby, settled, approved and allowed as a true bill of exceptions herein, and that the same, as so settled, allowed and approved, be now and here certified accordingly by the undersigned, the Judge of said court presiding herein, and who presided in said cause since its commencement, and who made the order to which said bill of exceptions is directed; and that said bill of exceptions,

when so certified to be filed by the clerk of said Court.

Dated, Honolulu, Hawaii, June ——, 1902.

_____,

Judge of said Court.

[Endorsed]: Title of Court and Cause. Filed June 30, 1902, at 1 o'clock, and 40 minutes P. M. W. B. Maling, Clerk. By Frank L. Hatch, Deputy Clerk. Received a copy this June 30, 1902. Hatch & Silliman and Fred W. Milverton, Counsel for Defendants.

United States of America,
District of Hawaii.

In the District Court of the United States, in and for the Territory of Hawaii.

UNITED STATES OF AMERICA,

Plaintiff and Petitioner,

vs.

ESTATE OF BERNICE PAUAHI BISHOP, Deceased; and JOSEPH O. CARTER, WILLIAM F. ALLEN, WILLIAM O. SMITH, SAMUEL M. DAMON, and ALFRED W. CARTER, Trustees Under the Will of Bernice Pauahi Bishop, Deceased, and of the Estate of said Bernice Pauahi Bishop, Deceased; and OAHU RAILWAY AND LAND COMPANY (a Corporation); and THE DOWSETT COMPANY, LIMITED (a Corporation); and HONOLULU PLANTATION COMPANY (a Corporation); and CHOW AH FO; and JOHN II ESTATE, LIMITED (a Corporation); and WILLIAM

G. IRWIN; and OAHU SUGAR COMPANY, LIMITED (a Corporation); and BISHOP AND COMPANY (a Copartnership),

Defendants and Respondents.

Notice of Presentation.

To Honolulu Plantation Company, a Corporation, One of the Above-named Defendants and Respondents, and to Its Attorneys:

You and each of you will please take notice hereby that on Tuesday, July 22d, 1902, we shall present to said Court the petition for writ of error herein and assignment of errors herein, and shall move said Court to allow said writ of error and to direct the issuance of the same, and of the citation herein. Copies of said petition for writ of error and of the assignment of errors herein are made a part of this notice, attached hereto and served herewith.

Dated, Honolulu, Hawaii, July 21st, 1902.

THE UNITED STATES OF AMERICA,

By R. W. BRECKONS,

United States Attorney in and for said District, and

J. J. DUNNE,

Assistant United States Attorney for said District.

Due service of the foregoing notice, and receipt of copies of the various papers therein referred to, are hereby admitted this 21st day of July, 1902.

HONOLULU PLANTATION COMPANY (a Corporation),

By HATCH & SILLIMAN,

Its Attorneys.

[Endorsed]: Title of Court and Cause. Notice of Presentation. Filed July 21st, 1902. W. B. Maling, Clerk. By Frank L. Hatch, Deputy Clerk.

United States of America,
District of Hawaii. } ss.

In the District Court of the United States, in and for the Territory of Hawaii.

THE UNITED STATES OF AMERICA,
Plaintiff and Petitioner,

vs.

ESTATE OF BERNICE PAUAHI BISHOP, Deceased; and JOSEPH O. CARTER, WILLIAM F. ALLEN, WILLIAM O. SMITH, SAMUEL M. DAMON, and ALFRED W. CARTER, Trustees Under the Will of Bernice Pauahi Bishop, Deceased, and of the Estate of said Bernice Pauahi Bishop, Deceased; and OAHU RAILWAY AND LAND COMPANY (a Corporation); and THE DOWSETT COMPANY, LIMITED (a Corporation); and HONOLULU SUGAR COMPANY (a Corporation); and HONOLULU PLANTATION COMPANY (a Corporation); and CHOW AH FO; and JOHN II ESTATE, LIMITED (a Corporation); and WILLIAM G. IRWIN; and OAHU SUGAR COMPANY, LIMITED (a Corporation); and BISHOP AND COMPANY (a Copartnership),

Defendants and Respondents.

Supplemental Notice of Presentation.

To Honolulu Plantation Company, a Corporation, One of the Above-named Defendants and Respondents, and to Its Attorneys:

You and each of you will please take notice hereby that inasmuch as, on this July 21st, 1902, said Court adjourned until Friday, July 25th, 1902, the undersigned, by reason of said adjournment will not present to said Court until said Friday, July 25th, 1902, the petition for writ of error and assignment of errors herein; and that, on said Friday, July 25th, 1902, the undersigned will move said Court to allow said writ of error, and to direct the issuance of the same, and of the citation herein. This notice is in addition and supplementary to the notice heretofore, on this July 21st, 1902, served upon you.

Dated, Honolulu, Hawaii, July 21st, 1902.

THE UNITED STATES OF AMERICA.

By R. W. BRECKONS,

United States Attorney, in and for said District, and

J. J. DUNNE,

Assistant United States Attorney for said District.

Due service of the foregoing notice, and receipt of a copy thereof are hereby admitted this 21st day of July, 1902.

HONOLULU PLANTATION COMPANY (a Corporation).

By HATCH & SILLIMAN and
FRED W. MILVERTON,
Its Attorneys.

[Endorsed]: Title of Court and Cause. Supplemental Notice of Presentation. Filed July 21st, 1902. W. B Maling, Clerk.

United States of America,
District of Hawaii.

In the District Court of the United States, in and for the Territory of Hawaii.

THE UNITED STATES OF AMERICA,
Plaintiff and Petitioner,

vs.

ESTATE OF BERNICE PAUAHI BISHOP, Deceased; and JOSEPH O. CARTER, WILLIAM F. ALLEN, WILLIAM O. SMITH, SAMUEL M. DAMON, and ALFRED W. CARTER, Trustees Under the Will of Bernice Pauahi Bishop, Deceased, and of the Estate of said Bernice Pauahi Bishop, Deceased; and OAHU RAILWAY AND LAND COMPANY (a Corporation); and THE DOWSETT COMPANY, LIMITED (a Corporation); and HONOLULU SUGAR COMPANY (a Corporation); and HONOLULU PLANTATION COMPANY (a Corporation); and CHOW AH FO; and JOHN II ESTATE, LIMITED (a Corporation); and WILLIAM G. IRWIN; and OAHU SUGAR COMPANY, LIMITED (a Corporation); and BISHOP AND COMPANY (a Copartnership),
Defendants and Respondents.

Petition for Writ of Error.

To the Honorable MORRIS M. ESTEE, Judge of the Above-entitled Court and Presiding Therein:

The above-named plaintiff and petitioner in the above-entitled cause, conceiving itself aggrieved by the final judgment, given, made and entered by the above-named

court, in the above-entitled cause, upon the issues therein joined between said plaintiff and petitioner and the above-named Honolulu Plantation Company, a corporation, one of the above-named defendants and respondents, under date of May 31st, A. D. 1902, said judgment being now on file in said cause and court, does hereby petition the above-entitled court for an order allowing said plaintiff and petitioner to prosecute a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, in the State of California, from said judgment, and from the whole thereof, for the reasons set forth in the assignment of errors which is filed herewith, under and pursuant to the laws of the United States in that behalf made and provided; and it prays that this its petition for its said writ of error may be allowed, and that a transcript of the record, proceedings and papers upon which said judgment was given, made and entered, as aforesaid, duly authenticated, may be sent to the said United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, in the State of California.

Dated, Honolulu, Hawaii, July 17, 1902.

THE UNITED STATES OF AMERICA,
Plaintiff and Petitioner.
By ROB'T W. BRECKONS,
United States Attorney, and
J. J. DUNNE,
Assistant United States Attorney, Counsel for said Plaintiff and Petitioner.

[Endorsed]: Title of Court and Cause. Petition for Writ of Error. Filed July 21, 1902. W. B. Maling, Clerk.

District of Hawaii.
United States of America,

In the District Court of the United States, in and for the District of Hawaii.

THE UNITED STATES OF AMERICA,

Plaintiff and Petitioner,

vs.

ESTATE OF BERNICE PAUAHI BISHOP, Deceased; and JOSEPH O. CARTER, WILLIAM F. ALLEN, WILLIAM O. SMITH, SAMUEL M. DAMON and ALFRED W. CARTER, Trustees Under the Will of Bernice Pauahi Bishop, Deceased; and of the Estate of said Bernice Pauahi Bishop, Deceased; and OAHU RAILWAY AND LAND COMPANY (a Corporation); and DOWSETT COMPANY, LIMITED (a Corporation); and HONOLULU SUGAR COMPANY (a Corporation); and HONOLULU PLANTATION COMPANY(a Corporation); and CHOW AH FO; and JOHN II ESTATE, LIMITED (a Corporation); and WILLIAM G. IRWIN, and OAHU SUGAR COMPANY, LIMITED (a Corporation); and BISHOP AND COMPANY (a Copartnership),

Defendants and Respondents.

Assignment of Errors.

HONOLULU PLANTATION COMPANY CASE.

Now, comes the above-named plaintiff and petitioner and makes and files the following assignment of errors upon which it will rely in the prosecution of its writ of

error in the above-entitled cause, as against Honolulu Plantation Company, a corporation, one of the above-named defendants and respondents:

1.

Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked on cross-examination from the witness, U. S. G. White: "Now, do you know whether there is a mill belonging to the plantation a mile from this land?" (Bill of Exceptions, Exception No. 2.)

And in this behalf, this assignment of errors now quotes the full substance of the evidence so admitted:

"Q. Now, do you know whether there is a mill belonging to the plantation a mile above this land?

"Mr. DUNNE.—I object to that as not proper cross-examination, and upon the ground that it is going into some other land, other than this land, outside of this land, which we do not know anything about. The witness testified that there was no mill on this land on July 6th, 1901, and he was not asked as to any other land—purely the land in controversy on July 6th, 1901.

"The COURT.—It is not cross-examination, but the Court will allow the witness to answer the question. The objection is overruled.

"Mr. DUNNE.—We except. (Exception No. 2.) And said plaintiff and petitioner now assigns said ruling as error."

"The WITNESS.—A. I know of the Honolulu Plantation's mill."

2.

Said Court erred in overruling the objections of plain-

tiff and petitioner to the following question asked on cross-examination from the witness, U. S. G. White: "And that it stands now where it stood on the 6th of July, 1901?" (Bill of Exceptions, Exception No. 3.)

And in this behalf, this assignment of errors now quotes the full substance of the evidence so admitted:

"Q. And that it stands now here it stood on the 6th of July, 1901?

"Mr. DUNNE.—I object to that. We are not trying to condemn any of this land, and I object to the introduction on cross-examination, of this matter. He testified that here was no mill on this land, the land involved in this case, as it stood on July 6th, 1901. He said nothing about any other land. This is objected to as irrelevant and immaterial, and not cross-examination or pertinent to any matter testified to by the witness on the direct examination.

"The COURT.—Now, you can answer yes or no, and then explain just as you like—that is, if you want to, without regard to either counsel.

"Mr. DUNNE.—We except. (Exception No. 3.) And said plaintiff and petitioner now assigns said ruling as error.

"The WITNESS.—A. Yes, sir."

3.

Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked on cross-examination from the witness, U. S. G. White: "What was the size, Captain, of that mill?" (Bill of Exceptions, Exception No. 4.)

And in this behalf, this assignment of errors now quotes the full substance of the evidence so admitted:

"Q. What was the size, Captain, of that mill?

"Mr. DUNNE.—That is objected to as immaterial, irrelevant and not cross-examination. I asked nothing about that mill. It is lugging in here entirely new matter to which no reference was made on the direct examination it seeking in the midst of a cross-examination to prove their case.

"The COURT.—Let him answer.

"Mr. DUNNE.—We except. (Exception No. 4.) And said plaintiff and petitioner now assigns said ruling as error.

"The WITNESS.—A. It is a large mill."

4.

Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked on cross-examination from the witness, U. S. G. White: "How far is this Halawa Valley that you have testified about in your first answer that I asked in regard to it from the land in question—the nearest portion to the land in question?" (Bill of Exceptions, Exception No. 5.)

And in this behalf, this assignment of errors now quotes the full substance of the evidence so admitted.

"Q. How far is this Halawa Valley that you have testified about in your first answer that I asked in regard to it from the land in question—the nearest portion to the land in question?

"Mr. DUNNE.—I object to that on the ground that it is wholly immaterial and not proper cross-examination, and not addressed to any subject matter to which the

witness' attention was called on the examination in chief; and upon the additional ground that he might as well be asked how far Paris is from this piece of land.

"The COURT.—That might be, but the Court will allow him to answer how far Halawa Valley is from this land.

"Mr. DUNNE.—We except. (Exception No. 5.) And said plaintiff and petitioner now assigns said ruling as error.

"The WITNESS.—A. I should say about a mile and a half, or a mile and a quarter—that is, by the road. I do not know, only approximately over how much country down there adjoining this land, the Honolulu Plantation Company's property extends; approximately, I should say that it extends over 5,000 or 6,000 acres, and includes the land surrounding this land. I think Halawa Valley is included in the Honolulu plantation property. I pass through it."

5.

Said Court erred in overruling the objection of plaintiff and petitioner to the following question asked on cross-examination from the witness, J. W. Pratt: "Now, Mr. Pratt, how is this return made up—what kind of a return is this under the law?" (Bill of Exceptions, Exception No. 6.)

And in this behalf this assignment of errors now quotes the full substance of the evidence so admitted.

"Q. Now, Mr. Pratt, how is this return made up—what kind of a return is this under the law?

"Mr. DUNNE.—I object to that on the ground that it is a double question.

"Mr. SILLIMAN.—I will divide it.

"The COURT.—Let us hear what Mr. Pratt says.

"Mr. DUNNE.—We except. (Exception No. 6.) And said plaintiff and petitioner now assigns said ruling as error.

"The WITNESS.—It is made under the head, aggregate value of plantations. It is under that head—a business for profit."

6.

Said Court erred in overruling the objections of plaintiff and petitioner to the following questions asked on cross-examination from the witness, F. K. Archer: "Now, Mr. Archer, do you know what that land is capable of yielding in sugar?" (Bill of Exceptions, Exception No. 7.)

And in this behalf, this assignment of errors now quotes the full substance of the evidence so admitted.

"Q. Now, Mr. Archer, do you know what that land is capable of yielding in sugar?

"Mr. DUNNE.—I object to that on the ground that it is not proper cross-examination, it appearing that no crop has ever been raised there.

"The COURT.—Answer the question. The objection is overruled.

"Mr. DUNNE.—We except. (Exception No. 7.) And said plaintiff and petitioner now assigns said ruling as error.

"The WITNESS.—Where it is good land, it will yield 9 or 10 tons per acre in cane; this land is good for cane, I say two feet deep dirt, where the dirt is 2 feet deep; that is good land. A portion of this land is waste and rocky—in fact, lava slabs. I mean to say that land that

could be plowed, some land might be a foot deep, it could be planted with cane all right to 18 or 20 or 24 inches deep, is all right, is all good land. I have gone over that land. I know the depth of soil upon it. Assuming that it is over 30 inches deep at the upper end and along the dividing line between that taken by the Government and Queen Emma's Estate line on the other side, and running from that down to nothing along the seashore—there is a strip along the seashore that is not arable; it ran from 30 inches at the Queen Emma line and nothing at the seashore line—I think about three hundred acres of that portion towards the seashore is arable, could be used, or what would you call good land."

7.

Said Court erred in denying to said plaintiff and petitioner an opportunity to state its objections to the following question asked on cross-examination from the witness, F. K. Acher: "Do you know whether the Honolulu Plantation Company had on the 6th of July, 1901, a water supply that was immediately available to this land in question"? (Bill of Exceptions, Exception No. 8.)

And in this behalf this assignment of errors now quotes the full substance of the aforesaid action of said Court:

"Mr. SILLIMAN.—Do you know whether the Honolulu Plantation Company had on the 6th day of July, 1901, a water supply that was immediately available to this land in question?

"Mr. DUNNE.—I object to that question on the ground—

"The COURT.—Ask the question.

"Mr. DUNNE.—We except. (Exception No. 8.) And

said plaintiff and petitioner now assigns said ruling as error.

"The WITNESS.—Yes, sir."

8.

Said Court erred in overruling the objection of plaintiff and petitioner to the following question asked on cross-examination from the witness, F. K. Archer. "What was the extent of that water supply?" (Bill of Exceptions. Exception No. 9.)

And in this behalf, this assignment of errors now quotes the full substance of the evidence so admitted.

"Mr. SILLIMAN.—What was the extent of that water supply?

"Mr. DUNNE.—I make the same objection, that we are getitng outside of the land in controversy.

"Mr. DUNNE.—We except. (Exception No. 9.) And said plaintiff and petitioner now assigns the said ruling as error.

"The WITNESS.—I don't know exactly how much, how many gallons of water would be pumped by those two pumps at Halawa. There is one big pump; approximately, about 10,000,000 gallons, more or less, and the other pump 7, more or less, in the other pump."

9.

Said Court erred in denying the motion of plaintiff and petitioner to strike out the answer and testimony given by said witness, F. K. Archer, on cross-examination, in response to the question: "What was the extent of that water supply?" (Bill of Exceptions, Exception No. 10.)

And in this behalf this assignment of errors now

quotes the full substance of the evidence so refused to be stricken out:

"The WITNESS.—I don't know exactly how much, how many gallons of water would be pumped by those two pumps at Halawa. There is one big pump; approximately, about 10,0000,000 gallons, more or less, and the other pump 7, more or less, on the other pump.

"Mr. DUNNE.—I move to strike out this testimony on the ground that it appears from his answer that this alleged water supply, which is not on the land, but so called 'immediately available'—whatever that means—springs from somewhere in the Halawa Valley; it goes back to the old thing that your Honor has ruled out heretofore—trying to fix the value of this land by something else.

"The COURT.—Immediately available to this land, that is the question, and that is what the Court ruled on. If it is immediately available to this land, they can prove it.

"Mr. DUNNE.—We except. (Exception No. 10.) And said plaintiff and petitioner now assigns said ruling as error.

"The COURT.—I do not think it is cross-examination: No, I do not."

10.

Said Court erred in overruling the objection of plaintiff and petitioner to the following question asked on cross-examination from the witness, F. K. Archer: "Do you know whether there is a flowing stream immediately available for use upon this land within the lines of the Honolulu Plantation Company?" (Bill of Exceptions, Exception No. 11.)

And in this behalf this assignment of errors now quotes the full substance of the evidence so admitted:

"Mr. SILLIMAN.—Q. Do you know whether there is a flowing stream immediately available for use upon this land within the lines of the Honolulu Plantation Company?

"Mr. DUNNE.—I object to that upon the grounds heretofore stated and as going outside of the land in controversy.

"The COURT.—If it is immediately available to this land, the witness can answer the question.

"Mr. DUNNE.—We except. (Exception No. 11.) And said plaintiff and petitioner now assigns said ruling as error.

"The WITNESS.—I do."

11.

Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked on cross-examination from the witness, F. K. Archer: "Well, now, assuming that the land is in the same condition, or substantially in the same condition on the 6th of July, 1901, and considering its situation, and the uses it might be put to, and the improvements put upon it, the plowing that has been done, the clearing that has been done, all of its usefulness, the whole property of the Honolulu Plantation Company, that is available for use in connection with that land—assuming those things, what do you say as to the value of the leasehold interest?" (Bill of Exceptions, Exception No. 12.)

And in this behalf this assignment of errors now quotes the full substance of the evidence so admitted:

"Q. Well, now, assuming that the land is in the same condition or substantially in the same condition on the 6th day of July, 1901, and considering its situation, and the uses it might be put to, and the improvements put upon it the plowing that has been done, the clearing that has been done, all of its usefulness, the whole property of the Honolulu Plantation Company that is available for use, in connection with that land, assuming those things, what do you say as to the value of the leasehold interest?

"Mr. DUNNE.—I object to that question on the ground that it is incompetent, an incompetent hypothetical question; it involves matters not established by any evidence in this case.

"The COURT.—Answer the question.

"Mr. DUNNE.—We except. (Exception No. 12.) And said plaintiff and petitioner now assigns said ruling as error.

"A. I think about one hundred thousand dollars. In estimating the value of the defendant's interests in this leasehold, I think I took into consideration the value of the use of the buildings on the land."

12.

Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked on cross-examination from the witness F. W. Thrum: "Now, Mr. Thrum, how do you know what this land will produce, or whether it is good cane land or not?" (Bill of Exceptions, Exception No. 13.)

And in this behalf this assignment of errors now quotes the full substance of the evidence so admitted:

"Q. Now, Mr. Thrum, how do you know what this land will produce, or whether it is good cane land or not?

"Mr. DUNNE.—I object to that as wholly immaterial and purely speculative. I object to the question on the ground it is a double-headed question. I have no objection to the latter part, as to how he knows that it is cane land. I object to the first half, not the latter half.

"The COURT.—Answer the question. The objection is overruled.

"Mr. DUNNE.—We except. (Exception No. 13.) And said plaintiff and petitioner now assigns said ruling as error.

"A. I have not testified that it was good cane land. It is not good cane land. I know the quality of this land from personal examination of it."

13.

Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked on cross-examination from the witness F. W. Thrum: "Do you know the yield of the Halawa Valley?" (Bill of Exceptions, Exception No. 14.)

And in this behalf this assignment of errors now quotes the full substance of the evidence so admitted.

"Q. Do you know the yield of the Halawa Valley?

"Mr. DUNNE.—I object to the yield of the Halawa Valley, on the ground that the yield of the Halawa Valley is wholly immaterial, and it not appearing that this land ever had any yield.

"The COURT.—The Court will give a pretty wide latitude in the examination of witnesses in relation to their qualifications to testify as to the values.

"Mr. DUNNE.—We except. (Exception No. 14.) And said plaintiff and petitioner now assigns said ruling as error.

"A. I do not."

14.

Said Court erred in sustaining the objections of said defendants, said Honolulu Plantation Company, to the following questions asked by said plaintiff and petitioner from the witness F. W. Thrum: "If a leasehold interest of forty years on that particular piece of land, seven years of which was fully paid up, the balance of which was held at three and one-half per cent of the sugar produced, provided it did not fall below $4,000 per annum for the entire tract of land, including other lands, the first lease including 2,900 acres, and the second 2,122 acres, if such a leasehold were offered for sale in the public market, what would you be willing to pay per acre for it?" (Bill of Exceptions, Exception No. 15.)

And in this behalf this assignment of errors now quotes the full substance of the evidence expected:

"A. Not over $20.00 per acre."

15.

Said Court erred in granting the motion of said defendant, said Honolulu Plantation Company, to strike out from the testimony of the witness, F. W. Thrum, the following passage: "I stated that part of my occupation on the Ewa plantation was the selection of cane land. The first case was in 1895, when Mr. Lowery was the manager, and many acres were valuable for the cultivation of cane below field 19—that was then the extent of the plantation in that direction. I was sent out there, and started field 19, and I cut lines through the algeroba,

the glue and the lantana, and was to report the land that I considered valuable for sugar cane, and after two or three weeks later I got around this tract, field 19, and reported to him the number of acres that I considered valuable for sugar cane in that vicinity. My report was accepted." (Bill of Exceptions, Exception No. 16.)

And in this behalf this assignment of errors now quotes the full substance of the evidence so stricken out.

"The WITNESS (To Mr. Dunne.)—I stated that part of my occupation on the Ewa plantation was the selection of cane land. The first case was in 1895, when Mr. Lowery was the manager, and many acres were valuable for the cultivation of cane below field 19—that was then the extent of the plantation in that direction. I was sent out there, and started at field 19, and I cut lines through the algeroba, the glue and the lantana, and was to report the land that I considered valuable for sugar cane, and after two or three weeks later I had got around this tract, field 19, and reported to him the number of acres that I considered valuable for sugar cane in that vicinity. My report was accepted.

"Mr. SILLIMAN.—I move to strike it out on the ground that it is not proper redirect examination.

"The COURT.—I do not think it is material. Let it be stricken out.

"Mr. DUNNE.—We except. (Exception No. 16.) And said plaintiff and petitioner now assigns said ruling as error."

16.

Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked on cross-examination from the witness, J. A. McCandless:

"What is the value set on that leasehold interest of 142 acres (referring to a certain tract of 142 acres on Ford Island, originally sought to be condemned in this action, but to which a discontinuance of the action was subsequently made and filed by plaintiff and petitioner and ordered by the Court)?" (Bill of Exceptions, Exception No. 17.)

And in this behalf this assignment of errors now quotes the full substance of the evidence so admitted:

"Q. What is the value set on that leasehold interest of 142 acres?

"Mr. DUNNE.—I object to this. The records of this court show that this entire matter was settled amicably between the Oahu Sugar Company and the Government. This is not proper cross-examination; it is not directed to any matter testified to by the witness in chief. It is not proper cross-examination; it has no materiality here.

"The COURT.—The Court will not rule out that testimony, but you can meet it, and you will have to meet it, if it is met at all, because the Court will not rule out any testimony that has a tendency to explain any facts that are introduced before the jury.

"Mr. DUNNE.—We except. (Exception No. 17.) And said plaintiff and petitioner now assigns said ruling as error.

"The WITNESS.—A. I see from that answer of the Oahu Sugar Company that they place a valuation of $200,000 on 142 acres on Ford Island that I have been testifying about. I do not know what the chemical analysis of the subsoil of Ford Island is. If you were to give me the chemical analysis of the subsoil, I do not think I would be able to understand it—everything."

17.

Said Court erred in overruling the objection of plaintiff and petitioner to the following question asked on direct examination from the witness J. A. Low: "Just explain the nature of your duties, and the nature of your experience and the nature of your study on the subject (of the growth and manufacture of sugar)." (Bill of Exceptions, Exception No. 18.)

And in this behalf, this assignment of errors now quotes the full substance of the evidence so admitted:

"Q. Just explain the nature of your duties, and the nature of your experience, and the nature of your study on the subject.

"Mr. DUNNE.—I object to that question on the ground that it involves three separate and distinct questions.

"The COURT.—Let him answer them.

"Mr. DUNNE.—We except. (Exception No. 18.) And said plaintiff and petitioner now assigns the said ruling as error.

"A. In connection with my duties as manager of the plantation, was to direct the general work of the plantation, employ men, plant cane, harvest it, employ skilled men, men trained in the different branches of the work, civil engineering, mechanical engineering, cultivation, the agricultural portion of the work, see to the animals, the driving, the handling of horses and mules, bookkeepers and accountants, chemists, sugar-boilers, electricians, and men adapted to locomotive engineering. The Honolulu Sugar Compnay was organized in May, 1898, I think. It was a corporation organized for the purposes of cultivating and manufacturing sugar, selling the sugar produced from the land, purchasing land, leasing land, run-

ning a mercantile business, and running pieces of railroad and pipe-lines, etc. These lands are situated in the Ewa and Kona Districts, Island of Oahu. The plantation has about 5,000 acres, situated around and adjoining this land. I think that the total acreage, rocky places and waste land, is about 8,000 acres. I figured it up for the last trial. There are five thousand acres of cane land."

18.

Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked on direct examination from the witness J. A. Low: "Why not (that is to say, why was not sugar grown on this land by the Honolulu Plantation Company)?" (Bill of Exceptions, Exception No. 19.)

And in this behalf this assignment of errors now quotes the full substance of the evidence so admitted:

"Q. Why not?

"Mr. DUNNE.—I object, for the reasons why the sugar was not grown on the land as being wholly immaterial; it is the fact we deal with, not the reasons that he may have for this fact.

"The COURT.—Ask him the question.

"Mr. DUNNE.—We except. (Exception No. 19.) And said plaintiff and petitioner now assigns the said ruling as error.

"A. Because we are a new plantation, and have not been able to get there. All new plantations must start from the mill and work out; and we have done so."

19.

Said Court erred in denying the motion of plaintiff and petitioner to strike out the answer and testimony given

by the witness C. Bolte, on direct examination, in response to the question, "Now, considering the property sought to be condemned in the state in which you saw it on the day that you viewed it, that it was in substantially the same state on the 6th of July, 1901, considering its situation and the uses that might be made of it and to which it was adapted, and assuming that the plantation has a thirty-nine years' lease, seven years' rental of which has been paid, and the remaining thirty-two years is upon a basis of a crop payment—that is, three and a half per cent of the sugar produced—and the payment of the taxes, the lease including other land (there was a minimum rent on the other land which is not material), and assuming that there are 342 acres of cane land in the area sought to be condemned, what, in your opinion, was the value of the leasehold interest of that land on the 6th of July, 1901, to the Honolulu Plantation Company?" (Bill of Exceptions, Exception No. 20.)

And in this behalf this assignment of errors now quotes the full substance of the evidence so refused to be stricken out:

"A. Four hundred and fifty thousand dollars."

20.

Said Court erred in denying the motion of plaintiff and petitioner to strike out the testimony of said witness, C. Bolte, given on direct examination, relative to the value of this leasehold to a particular individual, to the Honolulu Plantation Company. (Bill of Exceptions, Exception No. 21.)

And in this behalf this assignment of errors now

quotes the full substance of the evidence so refused to be stricken out:

"Q. Now, considering the property sought to be condemned in the state in which you saw it on the day that you viewed it, that it was in substantially the same state on the 6th of July, 1901, considering its situation and the uses that might be made of it, and to which it is adapted, and assuming that the plantation has a thirty-nine years' lease, seven years' rental of which has been paid, and the remaining thirty-two years is upon the basis of a crop-payment, that is, three and one-half per cent of the sugar produced, and the payment of the taxes, the lease including other land, there was a minimum rent upon the other land, which is not material, and assuming that there are 342 acres of cane land in the area sought to be condemned, what, in your opinion, was the value of the leasehold interests of that land on the 6th of July, 1901, to the Honolulu Plantation Company?

"A. Four hundred and fifty thousand dollars.

"Mr. DUNNE.—I move to strike out the testimony of this witness as to value of this leasehold to the Honolulu Plantation Company, on the ground that it is settled law that what this may be worth to the Honolulu Plantation Company is not a fair test of the market value.

"The COURT.—The Court will not strike it out.

"Mr. DUNNE.—We except. (Exception No. 20.) And said plaintiff and petitioner now assigns said ruling as error.

"Q. What was the market value?

"A. That is what I said. I have not made up my mind. I think it ought to be $250,000 or $300,000.

"The COURT.—Q. Is there any difference between the value and the market value?

"A. Yes, sir, the Honolulu Plantation; it might have a greater value to the Honolulu Plantation than to anyone else. If it were put in the market, there would be three buyers of this land—the Ewa, the Oahu and the Honolulu; but it has a distinct value to the Honolulu Plantation.

"Cross-Examination.

"Mr. DUNNE.—To save the right of the Government, I move to strike out the testimony of the witness relative to the value of this leasehold to a particular individual—to the Honolulu Plantation Company, on the ground that the compensation is the market value, and not the value which the property may or may not have to a particular individual.

"The COURT.—The Court will not strike it out.

"Mr. DUNNE.—We except. (Exception No. 21.) And said plaintiff and petitioner now assigns said ruling as error."

21.

Said Court erred in denying the motion of plaintiff and petitioner to strike out the answer and testimony of the witness, J. A. Low, during his direct examination, when resumed, in response to the question, "What was the value of the use of the buildings on that land for the remainder of your term of the lease?" (Bill of Exceptions, Exception No. 22.)

And in this behalf this assignment of errors now quotes the full substance of the evidence so refused to be stricken out:

"The value of the use of the buildings on that land for the remainder of our term of the lease was $13,000, I believe; the buildings are worth that to this company, because I do not believe that there would be a vestige of the buildings left at the termination of the lease, forty years from now."

22.

Said Court erred in denying the motion of plaintiff and petitioner to strike out the testimony of the witness, J. A. Low, on direct examination, when resumed, relative to the nature and quality of the soil upon the land sought to be condemned, to the Honolulu Plantation Company. (Bill of Exceptions, Exception No. 23.)

And in this behalf this assignment of errors now quotes the full substance of the evidence so refused to be stricken out:

"A. We have similar soil in the Halawa Valley that we have raised cane on.

"Mr. DUNNE.—I object to this comparison of outside soil; he was asked concerning this soil.

"The COURT.—He can go on if he will. Let us hear it.

"Mr. DUNNE.—We except. (Exception No. 23.) And said plaintiff and petitioner now assigns said ruling as error."

23.

Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked on direct examination from the witness J. A. Low: "What was its (the property sought to be condemned) value on the 6th of July, 1901?" (Bill of Exceptions, Exception No. 24.)

And in this behalf this assignment of errors now quotes the full substance of the evidence so admitted:

"Mr. SILLIMAN.—Q. What was its value on the 6th of July, 1901?

"A. To the Honolulu Plantation Company?

"Q. Yes, sir.

"Mr. DUNNE.—The same objection—not a proper test of market value.

"The COURT.—The same ruling.

"Mr. DUNNE.—We except. (Exception No. 24.) And said plaintiff and petitioner now assigns said ruling as error.

"A. Four hundred thousand dollars."

24.

Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked by said Honolulu Plantation Company, from the said witness J. A. Low, during his direct examination, when resumed: "Mr. Low, that portion of the tax return read in evidence here, showing the statement under the heading 'Leasehold interest—return of real estate leases as per schedule "B," $50,000'—what have you to say in regard to it, Mr. Low, by way of explanation?" (Bill of Exceptions, Exception No. 25.)

And in this behalf this assignment of errors now quotes the full substance of the evidence so admitted:

"Q. Mr. Low, that portion of the tax return read in evidence here showing the statement under the heading 'Leasehold interest—return of real estate leases as per schedule 'B,' $50,000,' what have you to say in regard to it, Mr. Low, by way of explanation?

"Mr. DUNNE.—I object to that; it is a mere ambiguous question—a sort of question that would permit almost any sort of an answer, hearsay or otherwise.

"The COURT.—Answer the question.

"Mr. DUNNE.—We except. (Exception No. 25.) And said plaintiff and petitioner now assigns said ruling as error.

"A. Fifty thousand dollars is a transcript of our books which show the cost of three rice plantations that were purchased, the leasehold interest in the three plantations which we purchased, an area of 113 acres of cane land."

25.

Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked by said Honolulu Plantation Company from the witness W. R. Castle on direct examination: "What knowledge have you of the development of the plantation in that district (meaning the District of Ewa)?" (Bill of Exceptions, Exception No. 26.)

And in this behalf this assignment of errors now quotes the full substance of the evidence so admitted:

"Q. What knowledge have you of the development of the plantations in that district?

"Mr. DUNNE.—I object to that as entirely irrelevant and immaterial to any issue in this case—as to the development of other plantations in that District.

"The COURT.—Answer the question.

"Mr. DUNNE.—We except. (Exception No. 26.) And said plaintiff and petitioner now assigns said ruling as error.

"The WITNESS.—I have been identified with the plantations there—the Ewa plantation more particularly—and have know about the development of all of these plantations beginning with the Ewa and coming down to the Honolulu plantation. I have had connections with some of the lands of the Honolulu plantation, but not including this portion now in controversy—lands that I had occasion to make over to the Honolulu Plantation Company, not this particular land; but I am talking about sales to the Honolulu Plantation Company. I sold—

"Mr. DUNNE.—I object to any statement about any sales that he may have made, or his connection with any land except this land.

"The WITNESS.—I am speaking about this land.

"Mr. DUNNE.—I am addressing an objection to the Court.

"The COURT.—He can testify to any sales that he made connected with this land.

"Mr. DUNNE.—He has testified already that he had nothing to do with this land.

"The WITNESS.—Recently, I said.

"Mr. SILLIMAN.—In times past. I am not asking for the amount of sales or anything.

'The WITNESS.—I am still the administrator of the estate and trustee of the Williams heirs. The estate sold this land, this particular land as well as others, it was sold about 1880. The estate of Williams had a leasehold in common with Jim Castle, and it covered this land as well as the other land, and after some years I sold out the interest of the estate of Williams to James

I. Dowsett. I suppose conveyances are of record. I made the conveyance in shape and delivered it to Mr. Dowsett. I covered the District of Halawa from the sea to the mountains. My impression is that there were about two or four thousand acres included in this land."

26.

Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked by said Honolulu Plantation Company from said witness W. R. Castle, on direct examination: "Now, Mr. Castle, considering the property sought to be condemned, the state which you saw it on the day that you viewed it, and assuming that it was substantially the same state on July 6th, 1901, and taking into consideration the situation of the land and all the uses that might be made of it; and assuming that the plantation has a thirty-nine years' lease, and that seven years' rental has been paid, and that the rental for thirty-two years is on the basis of three and one-half per cent of the sugar produced, and the payment of taxes (the lease covering other lands in addition to this), and for a minimum rental, and assuming that there are 342 acres of cane land of the land sought to be condemned, what in your opinion was the market value of that leasehold on the 6th of July, 1901?" (Bill of Exceptions, Exception No. 27.)

And in this behalf this assignment of errors now quotes the full substance of the evidence so admitted:

"Q. Now, Mr. Castle, considering the property sought to be condemned, the state which you saw it on the day that you viewed it, and assuming that it was in substantially the same state on July 6th, 1901, and taking into consideration the situation of the land and

all the uses that might be made of it; and assuming that the plantation has a thirty-nine years' lease, and that seven years' rental has been paid, and that the rental for thirty-two years is on the basis of three and one-half per cent of the sugar produced, and the payment of taxes (the lease covering other lands in addition to this), and for a minimum rental, and assuming that there are 342 acres of cane land of the land sought to be condemned, what in your opinion was the market value of that leasehold on the 6th of July, 1901?

"Mr. DUNNE.—I object to the question as immaterial, irrelevant and incompetent, not justified by the evidence, and without foundation in this; that there is no evidence here that the witness does know what was the market value of such a leasehold as described in the question, on July 6th, 1901.

"The COURT.—Let him answer it.

"Mr. DUNNE.—We except. (Exception No. 27.) And said plaintiff and petitioner now assigns said ruling as error.

"The WITNESS.—A. I should judge the value to be about $250,000."

27.

Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked by the said Honolulu Plantation Company from the witness W. W. Goodale on direct examination: "Now, Mr. Goodale, considering this land sought to be condemned, in the state in which you saw it on the day that you viewed it, and assume that it is in substantially the same state or was on the 6th of July last year, and

considering the situation of it, and the uses that might be made of the land and to which it was adapted, and assuming that the plantation had a thirty-nine years' lease, seven years' rental of which has been paid, the rental for thirty-two years is based upon three and one-half per cent of the sugar produced (the particular lease covers other land as well as this), has a minimum basis of rental and includes other land, and assume that there is 342 acres of cane land, what in your opinion is the market value of the leasehold to the Honolulu Plantation Company of the land sought to be condemned on the 6th of July last?" (Bill of Exceptions, Exception No. 28.)

And in this behalf this assignment of errors now quotes the full substance of the evidence so admitted.

"Q. Now, Mr. Goodale, considering this land sought to be condemned, in the state in which you saw it on the day that you viewed it, and assume that it is in substantially the same state or was on the 6th of July last year, and considering the situation of it, and the uses that might be made of the land and to which it was adapted, and assuming that the plantation had a thirty-nine years' lease, seven years' rental of which has been paid, the rental for thirty-two years is based upon three and one-half per cent of the sugar produced (the particular lease covers other land as well as this), has a minimum basis of rental and includes other land, and assume that there is three hundred and forty-two acres of cane land, what in your opinion is the market value of the leasehold to the Honolulu Plantation Company of the land sought to be condemned on the 6th of July last?

"Mr. DUNNE.—Objected to as immaterial, irrelevant

and incompetent, without foundation in this, that it is not a fair statement of the evidence, without foundation in this, that it does not appear that the witness does know the market value of such property on the 6th of July, 1901.

"The COURT.—The objection is overruled.

"Mr. DUNNE.—We except. (Exception No. 28.) And said plaintiff and petitioner now assigns said ruling as error.

"The WITNESS.—A. Three hundred thousand dollars."

28.

Said Court erred in overruling the objection of plaintiff and petitioner to the following question asked by said Honolulu Plantation Company from the witness G. F. Renton on direct examination: "Now, considering this property sought to be condemned in the state that you saw it on the day that you visited it, and assuming that it was in substantially the same situation on the 6th of July, 1901, and assuming that there is a lease for thirty-nine years, seven years of which has been paid up, and the rental for thirty-two years is on the basis of three and one-half per cent of the sugar produced (the lease covers other land as well as this), has a minimum rental which, however, has no materiality to the question, the payment of taxes, and considering all of the uses and purposes to be made of the land, and the situation in which it exists on that day, and assuming further that there was 342 acres of cane land within the area sought to be condemned, what in your opinion was the market value of the leasehold interest on the Honolulu Plantation Company on the 6th day of

July last year?" (Bill of Exceptions, Exception No. 29.)

And in this behalf this assignment of errors now quotes the full substance of the evidence so admitted:

"Q. Now, considering the property sought to be condemned in the state that you saw it on the day that you visited it, and assuming that it was in substantially the same situation on the 6th of July, 1901, and assuming that there is a lease for thirty-nine years, seven years of which has been paid up, and the rental for thirty-two years is on the basis of three and one-half of the sugar produced, (the lease covers other land as well as this), has a minimum rental which, however, has no materiality to the question, the payment of taxes; and considering all of the uses and purposes to be made of the land, and the situation in which it exists on that day, and assuming further that there was 342 acres of cane land within the area sought to be condemned, what in your opinion was the market value of the leasehold interest of the Honolulu Plantation Company on the 6th day of July last year?

"Mr. DUNNE.—Objected to as immaterial, irrelevant and incompetent, and not an accurate and faithful statement of the evidence, and without foundation in this, that it does not appear that the witness knows what the market value of the leasehold was at the time mentioned.

"The COURT.—The Court will overrule the objection.

"Mr. DUNNE.—We except. (Exception No. 29.) And said plaintiff and petitioner now assigns said ruling as error.

"The WITNESS.—A. I should estimate it at $250,000 as the value of the land for the leasehold."

29.

Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked by said Honolulu Plantation Company from the witness F. Meyer on direct examination: "Well, considering the property sought to be condemned, as to its location and all the uses that could be made of it, and assuming that it is in substantially the same situation as it was on the 6th day of July, 1901, and assuming that there is a lease of thirty-nine years, seven years of which are paid up, and thirty-two years of which are on the basis of three and one-half per cent of the sugar produced, together with the payment of taxes, and also saying that there is a minimum rental; that this three and one-half per cent should not be less than $4,000 a year; and assuming that there are 342 acres of cane land in the area sought to be condemned, what in your opinion was the market value of that leasehold interest on the 6th of July, 1901?" (Bill of Exceptions, Exception No. 30.)

And in this behalf this assignment of errors now quotes the full substance of the evidence so admitted:

"Q. Well, considering the property sought to be condemned as to its location, and all the uses that could be made of it, and assuming that it is substantially in the same situation as it was on the 6th day of July, 1901, and assuming that there is a lease of thirty-nine years, seven years of which are paid up, and thirty-two years of which are on the basis of three and one-half per cent of the sugar produced, together with the payment of taxes, and also saying that there is a minimum rental;

that this three and one-half per cent should not be less than $4,000 a year; and assuming also that there are 342 acres of cane land in the area sought to be condemned, what in your opinion was the market value of that leasehold interest on the 6th of July, 1901?

"Mr. DUNNE.—Objected to as incompetent, irrelevant and immaterial, and upon the ground that it is not a fair and accurate statement and is not a competent hypothetical question; and without foundation in this, that it does not appear that the witness knows the market value on the 6th of July, 1901.

"The COURT.—Answer the question. Objection overruled.

"Mr. DUNNE.—We except. (Exception No. 30.) And said plaintiff and petitioner now assigns said ruling as error.

"The WITNESS.—A. Three hundred thousand dollars."

30.

Said Court erred in overruling the objections of plaintiff and petitioner to the following questions asked by said Honolulu Plantation Company from the witness A. Ahrens on direct examination: "Now, considering the property sought to be condemned, and the situation in which you saw it on the day that you viewed—that is, in October; and assuming that it was in substantially the same situation that it was on July 6th, 1901; and after taking into consideration the use that might be made, the purpose to which it is adapted; and assuming that there is a thirty-nine years' lease, seven years of which are paid up, and the balance of the term is upon the basis of three and one-half per cent of the crop,

and I will also state for your information that there is a minimum basis, which includes other land, now, assuming that there was 342 acres of cane land included within the 561 acres, what in your opinion was the market value of the leasehold interest on the 6th of July last?" (Bill of Exceptions No. 31.)

And in this behalf this assignment of errors now quotes the full substance of the evidence so admitted:

"Q. Now, considering the property sought to be condemned, and the situation in which you saw it on the day that you viewed—that is, in October—and assuming that it was in substantially the same situation that it was on July 6th, 1901, and after taking into consideration the use that might be made, the purpose to which it is adapted, and assuming that there is a thirty-nine years' lease, seven years' of which are paid up, and the balance of the term is upon the basis of a three and one-half per cent of the crop, and I will also state for your information that there is a minimum basis which includes other land, now, assuming that there was 342 acres of cane land included within the 561 acres, what in your opinion was the market value of the leasehold interest on the 6th of July last?

"Mr. DUNNE.—I object to the question as irrelevant, and incompetent, and not a proper and accurate statement of the testimony; and without foundation, in that it does not appear that the witness knows what the market value of such a leasehold was on July 6th, 1901.

"The COURT.—The Court will make the same ruling and allow the testimony in.

"Mr. DUNNE.—We except. Exception No. 31.) And

said plaintiff and petitioner now assigns said ruling as error.

"The WITNESS.—A. Two hundred and seventy-five thousand dollars."

31.

Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked by said Honolulu Plantation Company from the witness, J. T. Crawley, on direct examination: "What do you know about the productive capacity of the soil of this land?" (Bill of Exceptions, Exception No. 32.)

And in this behalf this assignment of errors now quotes the full substance of the evidence so admitted:

"Q. What do you know about the productive capacity of the soil of this land?

"Mr. DUNNE.—I object to the question as immaterial, irrelevant and incompetent, and calling for a mere speculation and without foundation upon which any reasonable person can base an opinion.

"The COURT.—The objection is overruled.

"Mr. DUNNE.—We except. (Exception No. 32.) And said plaintiff and petitioner now assigns said ruling as error.

"The WITNESS.—A. The soil is very well adapted to the growing of cane; it is good soil. The chemical composition of it is good and compares favorably with other soil in the vicinity that is raising good crops of sugar."

32.

Said Court erred in overruling the objections of plaintiff and petitioner to the following question by said Honolulu Plantation Company from the witness, J. F. Mor-

gan, on direct examination: "Now, Mr. Morgan, taking into consideration the property sought to be condemned and its location and situation, and what can be done with the situation as you saw it on the day that you viewed it, the uses and purposes that the land can be put to, and assuming that the Honolulu Plantation Company has a thirty-nine years' lease, seven years' of which are paid up, and the balance of the term is based upon three and one-half per cent of the sugar produced from the land, the lease also covering other land, having a rental basis, and assuming that there was 342 acres of cane land upon the land sought to be condemned, what would you say was the market value of that leasehold interest on the 6th of July, 1901?" (Bill of Exceptions, Exception No. 33.)

And in this behalf this assignment of errors now quotes the full substance of the evidence so admitted:

"Q. Now, Mr. Morgan, taking into consideration the property sought to be condemned and its location and situation, and what can be done with the situation as you saw it on the day that you viewed it, the uses and purposes that the land can be put to; and assuming that the Honolulu Plantation Company has a thirty-nine years' lease, seven years' of which were paid up and the balance of the term is based upon three and one-half per cent of the sugar produced from the land, the lease also covering other land, having a rental basis; and assuming that there was 342 acres of cane land upon the land sought to be condemned, what would you say was the market value of that leasehold interest on the 6th of July, 1901?

"Mr. DUNNE.—I object to the question as irrelevant

and incompetent, and not a proper or accurate statement of the evidence; and without foundation in this, that it does not appear that the witness does know what the going market value was on July 6th, 1901.

"The COURT.—Let the witness answer.

"Mr. DUNNE.—I note an exception. (Exception No. 33.) And said plaintiff and petitioner now asigns said ruling as error.

"The WITNESS.—I put an estimation on the value of about one hundred and seventy-five thousand dollars."

33.

Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked by said Honolulu Plantation Company from the said witness. J. F. Morgan on redirect examination: "How many mills are there in the vicinity of this land?" (Bill of Exceptions, Exception No. 34.)

And in this behalf this assignment of errors now quotes the full substance of the evidence so admitted:

"Mr. SILLIMAN.—Q. How many mills are there in the vicinity of this land?

"Mr. DUNNE.—I object to that as irrelevant, incompetent, immaterial, and not proper redirect examination.

"The COURT.—Ask the question.

"Mr. DUNNE.—We except. (Exception No. 34.) And said plaintiff and petitioner now assigns said ruling as error.

"The WITNESS.—A. There is the Honolulu Plantation Company mill on right adjacent land to this; the Oahu mill a little further on; then comes the Ewa and the Waialua. I cannot say positively how far the Hono-

lulu mill is from this place, but it looks to me it was within, I should say, about two miles. I do not know how far away the Oahu mill is."

34.

Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked by said Honolulu Plantation Company from the witness, L. A. Thurston, on direct examination: "Now, considering the property sought to be condemned, Mr. Thurston, in the state in which you saw it on the day that you visited it last, and assuming that it was in substantially the same state and condition on the 6th of July, 1901, and taking into consideration the location of the land and of the uses to which it might be put, and to which it was adapted; and assuming the plantation has thirty-nine years' lease, seven years' rental of which is paid up, and the rental for thirty-two years thereof is on a basis of three and one-half per cent of the sugar produced, and the payment of taxes. (I will say that the leasehold covers other land, and has a minimum rental of $4,000, covering practically 2,000 acres); and assuming that there was 342 acres of cane land in the area sought to be condemned, what is your opinion of the market value of that leasehold interest on the 6th of July, 1901?" (Bill of Exceptions, Exception No. 35.)

And in this behalf this assignment of errors now quotes the full substance of the evidence so admitted:

"Q. Now, considering the property sought to be condemned, Mr. Thurston, in the state in which you saw it on the day that you visited it last, and assuming that it was substantially the same state and condition on the

6th of July, 1901, and taking into consideration the location of the land, and of the uses to which it might be put, and to which it was adapted, and assuming the plantation has thirty-nine years' lease, seven years' rental of which is paid up, and the rental of thirty-two years thereof is on a basis thereof of three and one-half per cent of the sugar produced, and the payment of taxes (I will say that the leasehold covers other land, and has a minimum rental of $4,000 covering practically 2,000 acres); and assuming that there was 342 acres of cane land in the area sought to be condemned, what is your opinion of the market value of that leasehold interest on the 6th of July, 1901?

"Mr. DUNNE.—I object to that as irrelevant and incompetent, and not a faithful and accurate statement of the evidence, and without any foundation in this, that it does not appear that the witness knows what the market value of this leasehold was on the 6th of July, 1901.

"The COURT.—Answer the question.

"Mr. DUNNE.—We except. (Exception No. 35.) And said plaintiff and petitioner now assigns said ruling as error.

"The WITNESS.—A. I consider that a conservative market value of that leasehold under the conditions which you stated would be between seven and eight hundred dollars per acre, for the 342 acres of cane land."

35.

Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked by said Honolulu Plantation Company from said witness,

L. A. Thurston, on redirect examination: "What can you say as to the quality of the soil on the land sought to be condemned as to its producing any crop of sugar." (Bill of Exceptions, Exception No. 36.)

And in this behalf this assignment of errors now quotes the full substance of the evidence so admitted:

"Mr. SILLIMAN.—Q. What can you say as to the quality of the soil on the land sought to be condemned as to its producing any crop of sugar?

"Mr. DUNNE.—I object to that as irrelevant, immaterial and incompetent, and not proper redirect examination.

"The COURT.—Ask the question.

"Mr. DUNNE.—We except. (Exception No. 36.) And said plaintiff and petitioner now assigns said ruling as error.

"The WITNESS.—A. I consider it first-class cane land."

36.

Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked by said Honolulu Plantation Company from the witness, J. R. Higby, on direct examination: "Are you able to state the value of the use of those buildings for the term of thirty-nine years?" (Bill of Exceptions, Exception No. 37.)

And in this behalf this assignment of errors now quotes the full substance of the evidence so admitted:

"Q. Are you able to state the value of the use of those buildings for the term of thirty-nine years?

"Mr. DUNNE.—I object to that as irrelevant and in-

competent, and upon the further ground that it does not call for the market value, but calls merely for an individual or personal value.

"The COURT.—The objection is overruled.

"Mr. DUNNE.—We except. (Exception No. 37.) And said plaintiff and petitioner now assigns said ruling as error.

"The WITNESS.—If you assume that the buildings are valueless at the end of thirty-nine years—I should say that the life of those buildings would not be thirty-nine years—I should place the value of the use for the term of thirty-nine years at what they cost."

37.

Said Court erred in overruling the objection of plaintiff and petitioner to the following question asked by said Honolulu Plantation Company from said witness, J. R. Higby, on direct examination: "Assuming that their life will be finished, what is the value of those buildings?" (Bill of Exceptions, Exception No. 38.)

And in this behalf this assignment of errors now quotes the full substance of the evidence so admitted:

"Q. Assuming that their life will be finished, what is the value of those buildings?

"Mr. DUNNE.—The same objection as heretofore made. (Exception 37.)

"The COURT.—The objection is overruled.

"Mr. DUNNE.—We except. (Exception No. 38. And said plaintiff and petitioner now assigns said ruling as error.

"A. I have some notes that I made of the value of the buildings. I am not exactly able to state the value

without refreshing my recollection from those notes. The total value is about $11,000—a little more than $11,000, not including the plumbing and pipes."

38.

Said Court erred in refusing to give to said jury the first instruction requested by said plaintiff and petitioner. (Bill of Exceptions, Exception No. 39.)

And in this behalf this assignment of errors now quotes said first instruction so refused:

"I instruct you that private property cannot be taken for public use without just compensation. These are the words of our fundamental law, the Federal constitution; and from them you will observe that the compensation spoken of must be 'just.' In this behalf I charge you that it is your duty to treat both sides of this case with equal fairness and impartiality, and to avoid giving to any one side any preferment or advantage denied to the other. In other words, when dealing with this matter of compensation, you are to remember that just compensation means compensation that is just both sides, just in regard to the public as well as to the individual. You are not, for instance, to place an unduly depreciative valuation upon this property because the Government desires it; nor should you place an exaggerated valuation on the property either because it is private property or because the Government may want it. Your province is to proceed and act throughout with even handed fairness and impartiality, treating both sides alike, and deciding disputed questions solely upon the

evidence received, and within the lines laid down by this charge."

39.

Said Court erred in refusing to give to said jury the second instruction requested by said plaintiff and petitioner. (Bill of Exceptions, Exception No. 40.)

And in this behalf this assignment of errors now quotes said second instruction so refused:

"I instruct you that whenever private property is taken for public purpose, the fair market value of the property at the time of the taking should be paid for it; and according to the statute of this territory, the actual value of the property at the date of the summons is designated as the measure of valuation of all property to be condemned; and I charge you that the date of the summons in this case is July 6th, 1901. It is to this date, therefore, that you are to look in fixing the value of the property involved in this case. You are to remember that the material matter for consideration is the actual condition of the property as it stood on that date. It is to this that you are limited; and beyond this you cannot go. The prospective or speculative value of the land from possible improvements or prospective uses, cannot be considered by you; the value must be actual, and not speculative or mere possible value, nor argumentative value. It is not, therefore, proper to consider how the property might be improved, or the cost of such improvements, nor can you consider what the probable value of the land would be if this or that im-

provement were placed upon it; nor can you consider the intention of the lessee to make such improvements, even though you should find any such intention to exist. In brief, you are to limit your consideration to the actual condition of this property as it actually stood on July 6th, 1901."

40.

Said Court erred in refusing to give to said jury the fourth instruction requested by said plaintiff and petitioner. (Bill of Exceptions, Exception No. 41.)

And in this behalf this assignment of errors now quotes said fourth instruction so refused:

"Some evidence has been introduced by the Government showing certain valuations, sworn to, and filed with the assessor, pursuant to the requirements of the territorial statute in that regard. Upon this subject I charge you that such sworn returns to the assessor are called by the law admissions against interest; and you may, therefore, and indeed it is your duty to do so, consider such sworn returns along with the other evidence in the case bearing upon the question of market value.

"In this connection, I charge you that the Government has introduced here a certain writing of the Honolulu Plantation Company, making an annual exhibit of its affairs, and showing the assets of the defendant on January 1st, 1901. I charge you that such writing and exhibit comes within the rule just stated concerning admissions against interest, and that it is your duty to consider such writing and exhibit in connection with the other evidence in the case bearing upon the question of market value."

41.

Said Court erred in refusing to give to said jury the fifth instruction requested by said plaintiff and petitioner. (Bill of Exceptions, Exception No. 42.)

And in this behalf this assignment of errors now quotes said fifth instruction so refused:

"You have been permitted to view the premises in question. The object of this view was to acquaint you with the physical condition and surroundings of the premises, and to enable you to better understand the evidence on the trial. The knowledge which you acquired by the view may be used by you in determining the weight of conflicting testimony respecting value and damage, but no further. Your final conclusion must rest on the evidence here adduced."

42.

Said Court erred in refusing to give to said jury the sixth instruction requested by said plaintiff and petitioner. (Bill of Exceptions, Exception No. 43.)

And in this behalf this assignment of errors now quotes the sixth instruction so refused:

"In cases of this character, much of the testimony consists in expressions of opinion touching the subject matter involved. It is your province to weigh the testimony of witnesses whose opinions have been given, by a reference to the whole situation of the property and its surroundings, and all the attendant circumstances, and by applying to it your own experience and general knowledge. The evidence of experts as to values and damages does not differ in principle from the evidence of experts upon other subjects. So far from laying aside their own

general knowledge and ideas, the jury may apply that knowledge and those ideas to the matters of fact in evidence, in determining the weight to be given to the opinion expressed. While the jury cannot act in any case upon particular facts material to its disposition resting in their private knowledge, but should be governed by the evidence adduced, they may and should judge of the weight and force of that evidence by their own general knowledge of the subject of inquiry; and while the law permits the opinions of those familiar with the subject to be given, such opinions are not to be blindly received, but are to be intelligently examined by the jury in the light of their own general knowledge, giving them force and control only to the extent that they are found to be reasonable. In other words, you are not bound by the opinions of experts, but you will take their testimony into consideration, along with all other evidence in the case, and award to it such value as in your judgment it deserves."

43.

Said Court erred in refusing to give to said jury the seventh instruction requested by said plaintiff and petitioner. (Bill of Exceptions, Exception No. 44.)

And in this behalf this assignment of errors now quotes the said seventh instruction so refused:

"In determining upon which side the preponderance of evidence is, you are not to be controlled by the mere number of witnesses produced, upon either side, but you should take into consideration the opportunities of the several witnesses for seeing or knowing the things about which they testified, their conduct and demeanor while testifying, their interest or lack of interest, if any, in the result of the suit, the probability or improbability of the

truth of their several statements in view of all of the other evidence adduced or circumstances proved on the trial, and from all the circumstances determine on which side is the weight or preponderance of the evidence. In dealing with the testimony, you must not forget by whom it was given, the motive of the particular witness, if any, the purpose by which he is actuated, the partisanship, if any, attributable to him. Indeed, any fact or circumstance by which his unbiased utterance of truth might be impeded or prevented, altogether, must receive your attention. Thus, you would not, as men of sense, so readily yield to the testimony of a witness whose partiality is known or observable, as you would have done had the same witness been wholly indifferent between the parties, and with no partisan motive to actuate him—no interest in the result of the trial other than the general interest which every good citizen ought to feel, that in this, as in all other trials, justice be done according to law."

44.

Said Court erred in refusing to give to said jury the eighth instruction requested by said plaintiff and petitioner. (Bill of Exceptions, Exception No. 45.)

And in this behalf this assignment of errors now quotes said eighth instruction so refused:

"At arriving at a verdict in this case, you are to give to the testimony such weight and effect as in your judgment it deserves; but you should not treat with such testimony arbitrarily or capriciously, nor should you limit your consideration to any isolated or fragmentary part thereof. On the contrary, you are to take into consideration all the evidence in the case, both direct and

circumstantial, together with all reasonable inferences to be drawn from that evidence."

45.

Said Court erred in refusing to give to said jury the ninth instruction requested by said plaintiff and petitioner. (Bill of Exceptions, Exception No. 46.)

And in this behalf this assignment of errors now quotes said ninth instruction so refused:

"In considering and deciding the facts in this case, I charge you that the property sought to be condemned herein is the leasehold interest of the Honolulu Plantation Company in and to 561.2 acres of land, and nothing more. In passing upon the facts, you will bear this constantly in mind."

46

Said Court erred in permitting to be rendered and in receiving the verdict herein. (Bill of Exceptions, Exception No. 47.)

And in this behalf this assignment of errors now states the grounds of this exception and of this assignment of error as follows:

1. Insufficiency of the evidence to justify said verdict:

(a) There is no evidence to support the finding that the market value of the leasehold interest of said Honolulu Plantation Company in the land involved herein is of the sum of $94,000 or any other sum in excess of $75,000.

(b) There is no evidence to support the finding that the market value of all improvements upon said land is of the sum of $8523, or any other sum.

(c) There is no evidence of the market value of said leasehold interest, or of any market value of said leasehold interest in excess of $75,000.

(d) There is no evidence of the existence upon said land of any improvements, or of the market value, if any, of any such improvements.

2. Said verdict is in opposition to, wholly inconsistent with, and not supported by the former adjudication of said Court as to the compensation of said Honolulu Plantation Company. And in this behalf this assignment of errors shows that in and by the judgment of said Court, in the above-entitled action (which said judgment is fully set out in the bill of exceptions herein) between the same parties, upon the same pleadings, and upon the same evidence, the "full Compensation" of said Honolulu Plantation Company herein "for its damages of every kind and character in this case," was formerly, to wit, on July 25th, 1902, adjudicated by said Court not to exceed the sum of $75,000.

3. Said verdict is contrary to and against the law and the evidence:

(a) Because of errors of law occurring during the trial, and excepted to by plaintiff and petitioner, said errors being included within the above and foregoing assignment of errors, numbered herein from 1 to 45, inclusive.

(b) Because said verdict was made, given and rendered by a jury.

(c) Because said verdict was made, given and rendered without sufficient evidence to support, sustain or justify it; and in this behalf this assignment of errors refers to the paragraph hereinabove marked No. 1.

4. Said verdict is not sustained or justified by either the law or the evidence, or the weight of the evidence, herein:

(a) Because of the insufficiency of the evidence to justify said verdict, as set out in paragraph numbered 1, supra.

(b) Because said verdict is in opposition to, wholly inconsistent with, and not supported by the former adjudication of said Court as to the compensation of said Honolulu Plantation Company; as more fully set out in paragraph 2, supra.

(c) Because said verdict is contrary to, and against the law and the evidence as more fully set out in paragraph 3, supra.

(d) Because said verdict was made, given and rendered by a jury.

(e) Because of the errors of law occurring during the trial and hereinabove assigned and enumerated.

5. Said verdict is excessive in this, that it attempts to award excessive, unreasonable and inconsistent compensation for damages herein, the amount thereof being without the evidence, with no evidence to support it and against the evidence, and against the former adjudication of said Court made July 25th, 1902, and hereinabove referred to.

6. Said verdict is contrary to and against the charge of the Court herein:

(a) Because said jury failed to consider all the testimony as a whole, with all its reasonable inferences.

(b) Because said jury failed to consider the market value of the land involved in its actual condition on July 6th, 1901.

(c) Because said jury considered speculative or possible value and not market value.

(d) Because said jury was neither guided nor gov-

erned by the preponderance of the evidence, or by the amount of just compensation to be awarded.

(e) Because said jury gave undue and excessive weight to the expert testimony introduced by said Honolulu Plantation Company.

47.

Said Court erred in refusing to grant a new trial herein;

(a) Because said cause was illegally tried before a jury, instead of before a Court.

(b) Because said Court, in passing upon plaintiff and petitioner's motion for a new trial of said cause, did not weigh all of the evidence, and did not exercise its discretion to say whether or not, in its opinion, said verdict was so opposed to the weight of the evidence that a new trial should be granted; and did not accord to said plaintiff and petitioner its right to have all of the evidence weighed by said Court and to have said discretion of said Court exercised in the mode and manner just herein referred to.

48.

Said Court erred in making, giving, rendering and filing its judgment herein upon and pursuant to said verdict.

Wherefore, the said The United States of America, plaintiff in error herein, prays that the judgment of the District Court of the United States for the District of

Hawaii be reversed, and that said District Court be directed to grant a new trial of said cause.

Dated, Honolulu, Hawaii, July 17th, 1902.

ROBERT W. BRECKONS,

United States Attorney in and for the District of Hawaii, and

J. J. DUNNE,

Assistant United States Attorney in and for said District,

Attorneys for said Plaintiff in Error.

[Endorsed]: Title of Court and Cause. Filed July 21, 1902. W. B. Maling, Clerk.

United States of America,
District of Hawaii.

In the District Court of the United States, in and for the Territory of Hawaii.

UNITED STATES OF AMERICA,

Plaintiff and Petitioner.

vs.

ESTATE OF BERNICE PAUAHI BISHOP, Deceased; and JOSEPH O. CARTER, WILLIAM F. ALLEN, WILLIAM O. SMITH, SAMUEL M. DAMON, and ALFRED W. CARTER, Trustees under the Will of Bernice Pauahi Bishop, Deceased, and of the Estate of said Bernice Pauahi Bishop, Deceased; and OAHU RAILWAY AND LAND COMPANY (a Corporation); and THE DOWSETT COMPANY, LIMITED (a Corporation); and

HONOLULU PLANTATION COMPANY (a Corporation); and CHOW AH FO; and JOHN II ESTATE, LIMITED (a Corporation); and WILLIAM G. IRWIN; and OAHU SUGAR COMPANY, LIMITED (a Corporation); and BISHOP AND COMPANY (a Copartnership),

Defendants and Respondents.

Order Allowing Writ of Error.

At a stated term, to wit, the April term, A. D. 1902, of the above-entitled Court, held at its courtroom in the city of Honolulu, in the aforesaid District of Hawaii, on the 25th day of July, A. D. 1902 Present: The Honorable MORRIS M. ESTEE, Judge of said Court above named.

Upon the petition of the plaintiff and petitioner above named, and on motion of R. W. Breckons, Esq., United States Attorney for said District, and J. J. Dunne, Esq., Assistant United States Attorney for said District, counsel for the above-named plaintiff and petitioner—

It is hereby ordered that a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, State of California, from the final judgment heretofore given, made, filed and entered by the above-named Court, in the above-entitled cause, upon the issues therein joined between said plaintiff and petitioner and the above-named Honolulu Plantation Company, a corporation, one of the above-named defendants and respondents, under date of May 31st, A. D. 1902, be, and the same is hereby, allowed, and that a certified transcript of the record, testimony, exhibits, stipulations, and all proceedings herein, be forth-

with transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit.

Dated, Honolulu, Hawaii, July 25th, A. D. 1902.

MORRIS M. ESTEE,
Judge of said Court.

Due service of the above order, and receipt of a copy thereof, are hereby admitted this July 26th, 1902.

HONOLULU PLANTATION COMPANY (a Corporation).

By HATCH & SILLIMAN,
Its Attorneys.

[Endorsed]: Title of Court and Cause. Order Allowing Writ of Error. Filed July 25, 1902. W. B. Maling, Clerk. By Frank L. Hatch, Deputy Clerk.

In the District Court of the United States, in and for the District of Hawaii.

THE UNITED STATES OF AMERICA,
Plaintiff and Petitioner,
vs.
THE HONOLULU PLANTATION COMPANY (a corporation), et al.,
Defendants and Respondents.

Praecipe for Transcript.

To the Clerk ot the Above-entitled Court:

You will please prepare transcript of the record in this cause, to be filed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, under the appeal heretofore perfected

to said Court and include in said transcript the following pleadings, proceedings, and papers on file, to wit:

Petition, filed July 6, 1901.

Summons and Return, filed July, 26, 1901.

Answer Honolulu Plantation Company, filed Aug. 2, 1901.

Amended Answer Honolulu Plantation Company, filed Sept. 20, 1901.

Notice, Motion and Demand for Jury Trial, filed Sept. 20, 1901.

Amended Answer Honolulu Plantation Company, filed Oct. 9, 1901.

Decision on Motion for New Trial, filed Jan. 25, 1902.

Refusal to Accept Suggestion to Remit Portion of Verdict, filed Jan. 27, 1902.

Transcript of Testimony, filed April 26, 1902.

Instructions Requested by Plaintiff, filed March 11, 1902.

Instructions Requested by Defendant, filed March 11, 1902.

Charge to Jury, filed March 11, 1902.

Verdict, filed, March 11, 1902.

Order, filed March 12, 1902.

Notice and Motion for New Trial, filed March 20, 1902.

Stipulation, filed March 21, 1902.

Notice of Motion for New Trial, filed April 25, 1902.

Opinion on Motion for New Trial, filed May 13, 1902.

Stipulation, filed May 13, 1902.

Decree, filed May 31, 1902.

Bill of Exceptions, filed May 31, 1902.

Stipulation and Order, filed June 4, 1902.

Motion, filed June 9, 1902.

Stipulation, filed June 16, 1902.

Supplemental Bill of Exceptions, filed June 30, 1902.

Notice of Presentation, filed July 21, 1902.

Supplemental Notice of Presentation, filed July 21, 1902.

Petition for Writ of Error, filed July 21, 1902.

Assignment of Errors, filed July 21, 1902.

Order Allowing Writ of Error, filed July 25, 1902.

Minute Entries from March 3, 1902 to May 15, 1902.

Citation on Appeal (Original), filed July 26, 1902.

Writ of Error (Original), filed July 26, 1902.

This Praecipe

Said transcript to be prepared as required by law and the rules of this Court and the rules of the United States Circuit Court of Appeals for the Ninth Circuit, and filed in the office of the clerk of the said Circuit Court of Appeals at San Francisco, before August 23d, A. D. 1902.

ROBT. W. BRECKONS,
J. J. DUNNE,
Attorneys for the United States.

[Endorsed]: Filed July 28th, 1902. W. B. Maling, Clerk.

In the District Court of the United States, in and for the Territory and District of Hawaii.

Clerk's Certificate to Transcript.

United States of America, }
Territory of Hawaii. } ss.

I, Walter B. Maling, clerk of the District Court of the United States for the Territory of Hawaii, do hereby certify the foregoing —— pages, numbered from 1 to 827, inclusive, and comprised in the preceding two volumes, numbered volumes 1 and 2, respectively, to be a true copy of the record, opinions of the Court, bill of exceptions, assignment of errors, praecipe for transcript and all proceedings in the above-entitled case, as the same appear in my office, and that the same together constitute the return to annexed writ of error herein on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that I hereto annex and herewith transmit the original citation on appeal and writ of error, in said cause.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court this 12th day of September, A. D. 1902.

[Seal.] W. B. MALING,
Clerk.

United States of America,
District of Hawaii.

In the District Court of the United States, in and for the District of Hawaii.

THE UNITED STATES OF AMERICA,
Plaintiff and Petitioner,

vs.

ESTATE OF BERNICE PAUAHI BISHOP, Deceased; and JOSEPH O. CARTER, WILLIAM F. ALLEN, WILLIAM O. SMITH, SAMUEL M. DAMON and ALFRED W. CARTER, Trustees Under the Will of Bernice Pauahi Bishop, Deceased; and of the Estate of said Bernice Pauahi Bishop, Deceased; and OAHU RAILWAY AND LAND COMPANY (a Corporation); and THE DOWSETT COMPANY, LIMITED (a Corporation); and HONOLULU SUGAR COMPANY (a Corporation); and HONOLULU PLANTATION COMPANY (a Corporation; and CHOW AH FO; and JOHN II ESTATE, LIMITED (a Corporation); and WILLIAM G. IRWIN; and OAHU SUGAR COMPANY, LIMITED (a Corporation); and BISHOP AND COMPANY (a Copartnership),
Defendants and Respondents.

Citation.

United States of America.—ss.

The President of the United States, to Honolulu Plantation Company, a Corporation; and to Hatch & Silliman, Its Attorneys, Greeting:

You, and each of you, are hereby cited and admon-

ished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, in the State of California, within thirty (30) days from the date of this writ, pursuant to a writ of error filed in the clerk's office of the above-named District Court of the United States in and for the Territory and District of Hawaii, wherein The United States of America is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the final judgment in said writ of error mentioned, and from which said writ of error has been allowed, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States of America, this 26th day of July, A. D. 1902, and of the Independence of the United States the one hundred and twenty-sixth.

MORRIS M. ESTEE,
United States District Judge, Presiding in the Above-entitled Court.

[Seal. Attest. W. B. MALING,
Clerk of the Above-entitled Court.

United States of America,
Territory and District of Hawaii.

I hereby certify that I served the foregoing citation on the 26th day of July, A. D. 1902, in the city of Honolulu, in said District, on William G. Irwin, then and there the resident manager, and known to me to be the resident manager of said Honolulu Plantation Company, said corporation, and said defendant in error

herein, by then and there personally delivering to and leaving with said William G. Irwin, a true copy of said citation; and I further testify that on the 26th day of July, A. D. 1902, in said city of Honolulu in said District, I served the foregoing citation on Messrs. Hatch & Silliman, then and there the counsel for said Honolulu Plantation Company, said defendant in error herein, by then and there personally delivering to and leaving with said attorneys, personally, a true copy of said citation, said Hatch & Silliman being then and there known to me to be the attorneys of and for said defendant in error herein.

MARSHAL'S FEES.

Service 2 citations, $2.00 each,.....$4.00
Mileage, 2 miles, $.06 each,..... .12

$4.12

Dated, Honolulu, Hawaii, July 26th, A. D. 1902.

[Seal.] E. R. HENDRY,
United States Marshal in and for said District.

[Endorsed]: United States District Court, District of Hawaii. The United States of America, Plaintiff and Petitioner, vs. Honolulu Plantation Company, a Corporation, et al., Defendants and Respondents. Citation. Filed July 26, 1902. W. B. Maling Clerk.

United States of America,
District of Hawaii.

In the District Court of the United States, in and for the District of Hawaii.

THE UNITED STATES OF AMERICA,
Plaintiff and Petitioner,

vs.

ESTATE OF BERNICE PAUAHI BISHOP, Deceased; and JOSEPH O. CARTER, WILLIAM F. ALLEN, WILLIAM O. SMITH, SAMUEL M. DAMON and AIFRED W. CARTER, Trustees Under the Will of Bernice Pauahi Bishop, Deceased, and of the Estate of said Bernice Pauahi Bishop, Deceased; and OAHU RAILWAY AND LAND COMPANY (a Corporation); and THE DOWSETT COMPANY, LIMITED (a Corporation); and HONOLULU SUGAR COMPANY (a Corporation); and HONOLULU PLANTATION COMPANY (a Corporation); and CHOW AH FO; and JOHN II ESTATE, LIMITED (a Corporation); and WILLIAM G. IRWIN; and OAHU SUGAR COMPANY, LIMITED, (a Corporation); and BISHOP AND COMPANY (a Copartnership),
Defendants and Respondents.

Writ of Error.

United States of America,—ss.

The President of the United States of America, to the Honorable MORRIS M. ESTEE, Judge of the United States District Court, for the Territory of Hawaii, Greeting:

Because in the record and proceedings, as also in the giving, making, rendition, entering and filing of the final judgment in that certain cause in the aforesaid District Court, before you, between The United States of America, plaintiff and petitioner, and Honolulu Plantation Company, a Corporation, defendant and respondent, and one of the defendants and respondents above named, a manifest error hath happened, to the great prejudice and damage of said plaintiff and petitioner, The United States of America, as is said and appears by the petition herein.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid, in this behalf do command you, if justice be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Justices of the United States Circuit Court of Appeals for the Ninth Circuit, in the city of San Francisco, in the State of California, together with this writ, so as to have the same at the said place in the said Circuit on the 23d day of August, A. D. 1902, that the said records and proceedings aforesaid being inspected the said Circuit Court of Appeals may cause further to be done therein to correct those errors what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, this 26th day of July, A. D. 1902. Attest my hand and the seal of the United States District Court for the Ter-

ritory of Hawaii, at the clerk's office at Honolulu in said territory, on the day and year last above written.

[Seal] W. B. MALING,
Clerk of the United States District Court for the Territory of Hawaii.

Allowed, this July 26th, A. D. 1902.

MORRIS M. ESTEE,
Judge of the United States District Court for the Territory of Hawaii.

Service of the above writ, and receipt of a copy thereof, are hereby admitted this 26th day of July, A. D. 1902.

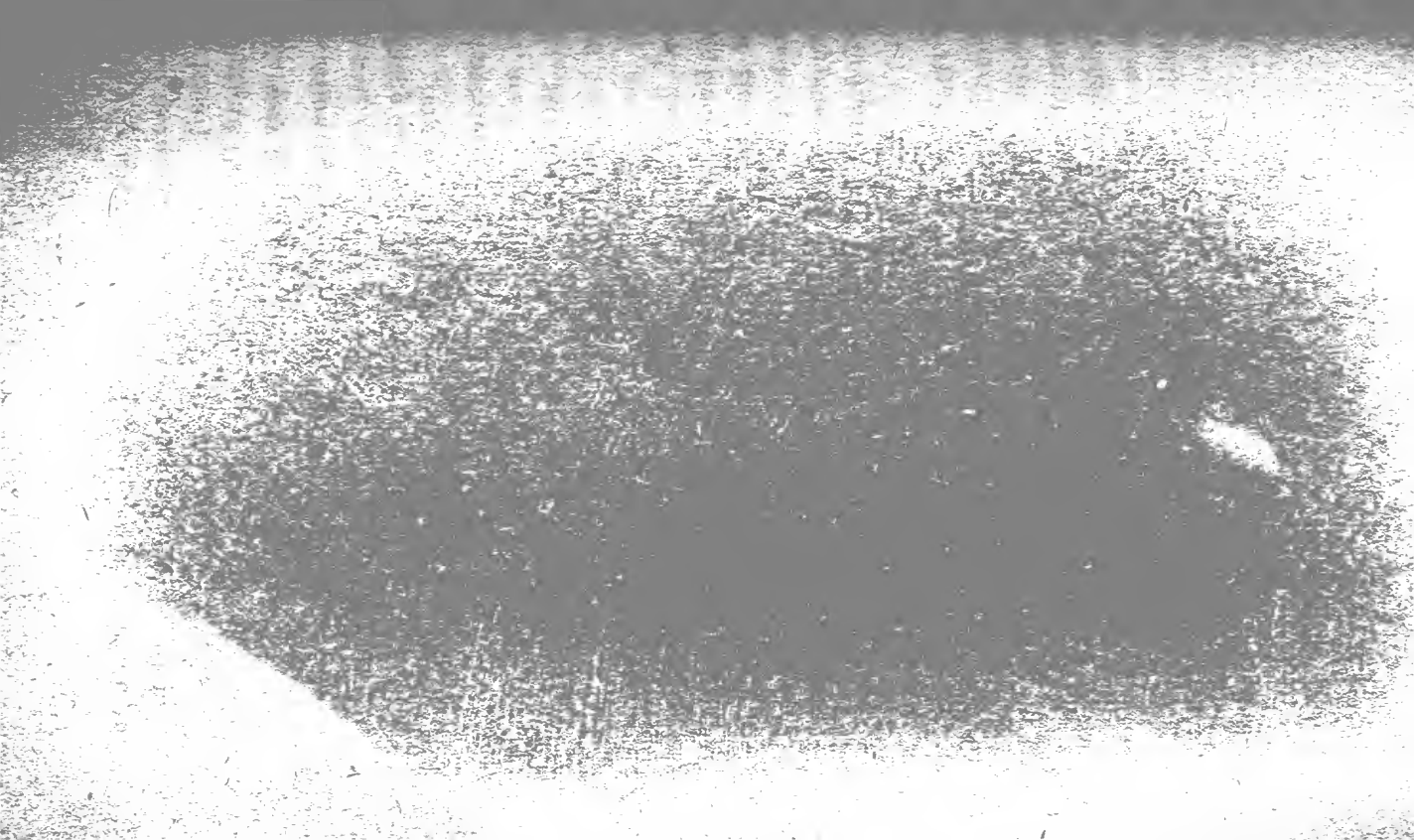
HONOLULU PLANTATION COMPANY (a Corporation),
By HATCH & SILLIMAN,
Its Counsel.

[Endorsed]: United States District Court, District of Hawaii. The United States of America, Plaintiff and Petitioner, vs. Honolulu Plantation Company (a Corporation et al., Defendants and Respondents. Writ. Filed July 26th, 1902. W. B. Maling, Clerk.

[Endorsed]: No. 896. In the United States Circuit Court of Appeals for the Ninth Circuit. The United States of America, Plaintiff in Error, vs. The Honolulu Plantation Company, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court, for the District of Hawaii.

Filed September 19, 1902.

FRANK D. MONCKTON,
Clerk.
By Meredith Sawyer,
Deputy Clerk.



No. 896

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

TRANSCRIPT OF RECORD.

THE UNITED STATES OF AMERICA,

Plaintiff in Error,

vs.

THE HONOLULU PLANTATION COMPANY (a Corporation),

Defendant in Error.

VOL. IV.

(Pages 876 to 925, Inclusive.)

Upon Writ of Error to the United States District Court, for the District of Hawaii.

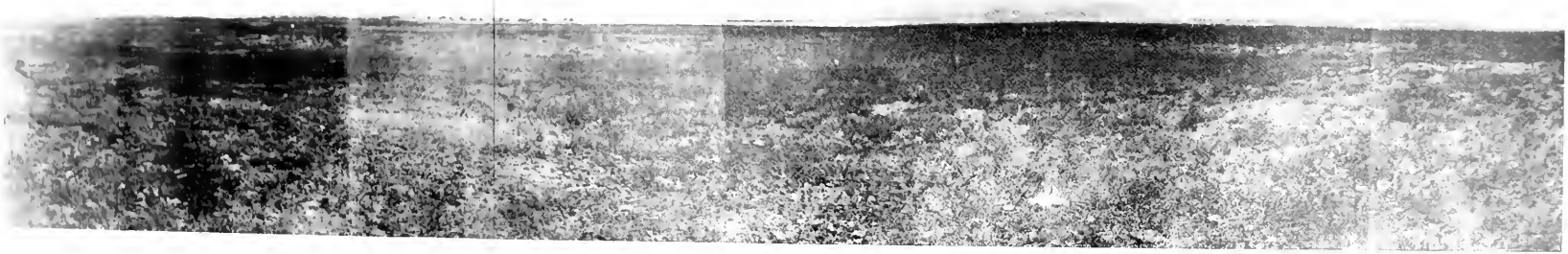
THE FILMER BROS. CO. PRINT, 424 SANSOME ST., S.

INDEX

EXHIBITS.

[Endorsed]: No. 896. In the United States Circuit Court of Appeals for the Ninth Circuit. Plaintiff's Exhibit No. 1. Received September 29, 1902. F. D Monckton, Clerk. By Meredith Sawyer, Deputy Clerk

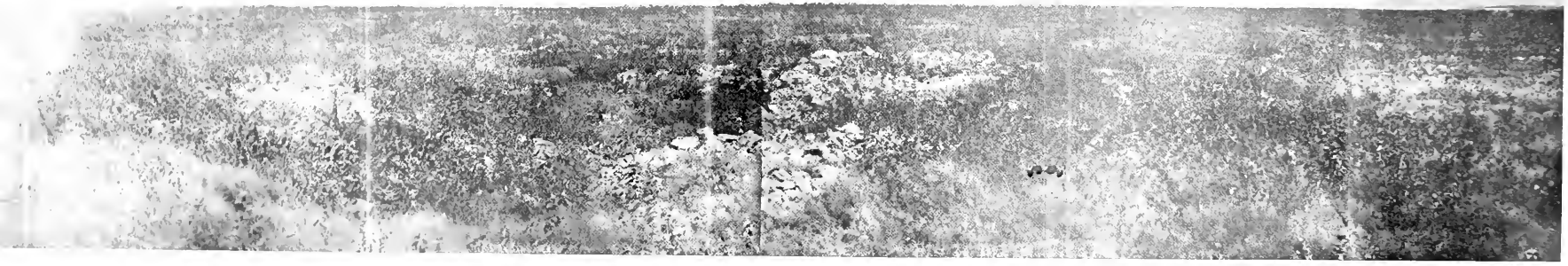
Plaintiff's Exhibit No. 1.



[Endorsed]: Plaintiff's Exhibit No. 1. F. L. Hatch, Dep. C. U. S. vs. Hon. Plan. Co.

[Endorsed]: No. 896. In the United States Circuit Court of Appeals for the Ninth Circuit. Plaintiff's Exhibit No. 1. Received September 29, 1902. F. D. Monckton, Clerk. By Meredith Sawyer, Deputy Clerk.

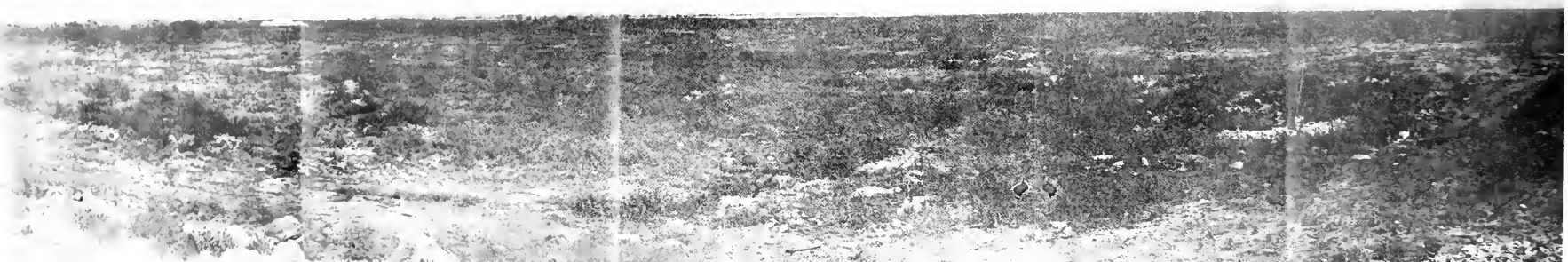
Plaintiff's Exhibit No. 2.



Endorsed]: Plaintiff's Exhibit No. 2. F. L. Hatch, Dep. C. F. S. vs. Hon. Plan. Co.

[Endorsed]: No. 896. In the United States Circuit Court of Appeals for the Ninth Circuit. Plaintiff's Exhibit No. 2. Received September 29, 1902. F. D. Monckton, Clerk. By Meredith Sawyer, Deputy Clerk.

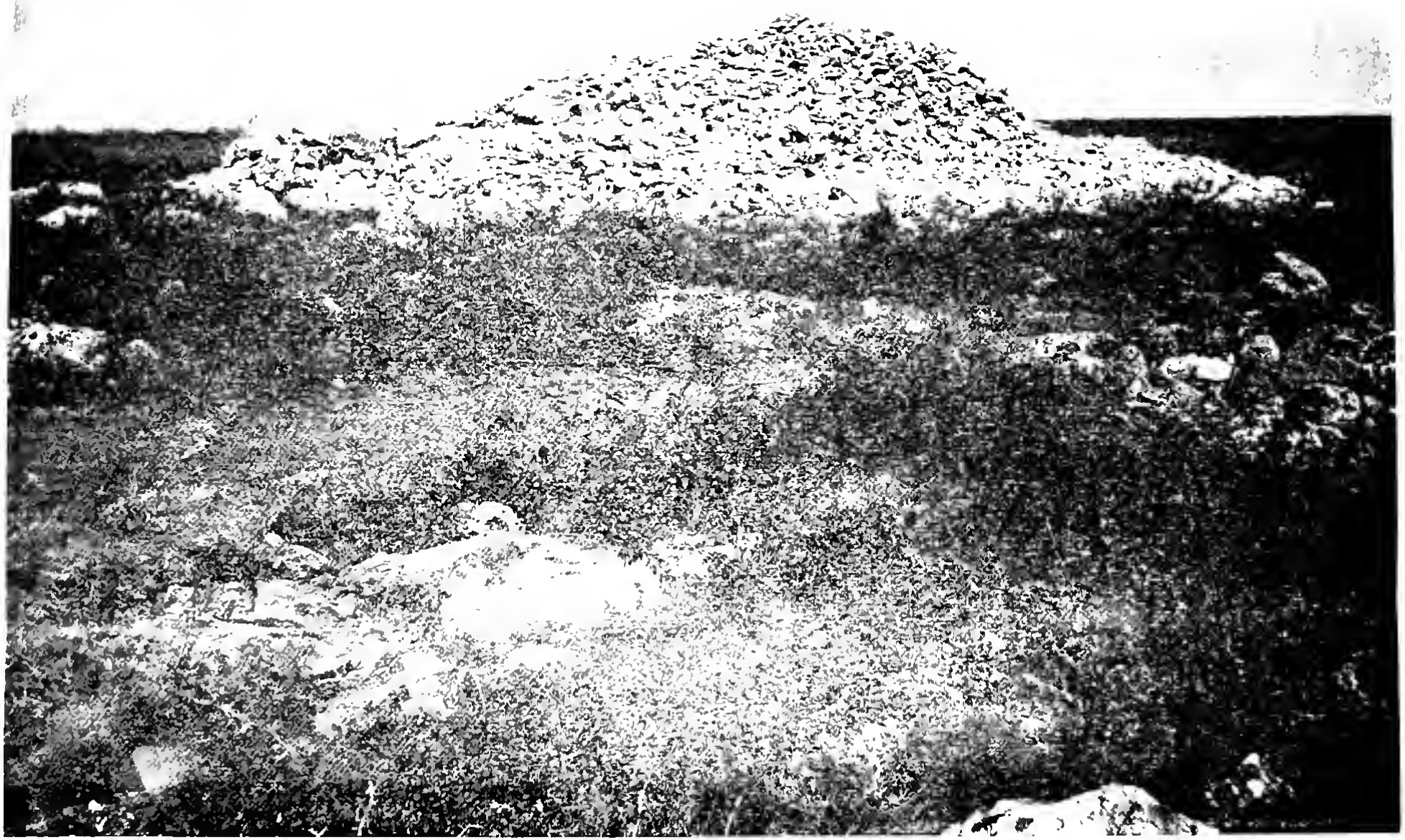
Plaintiff's Exhibit No. 3.



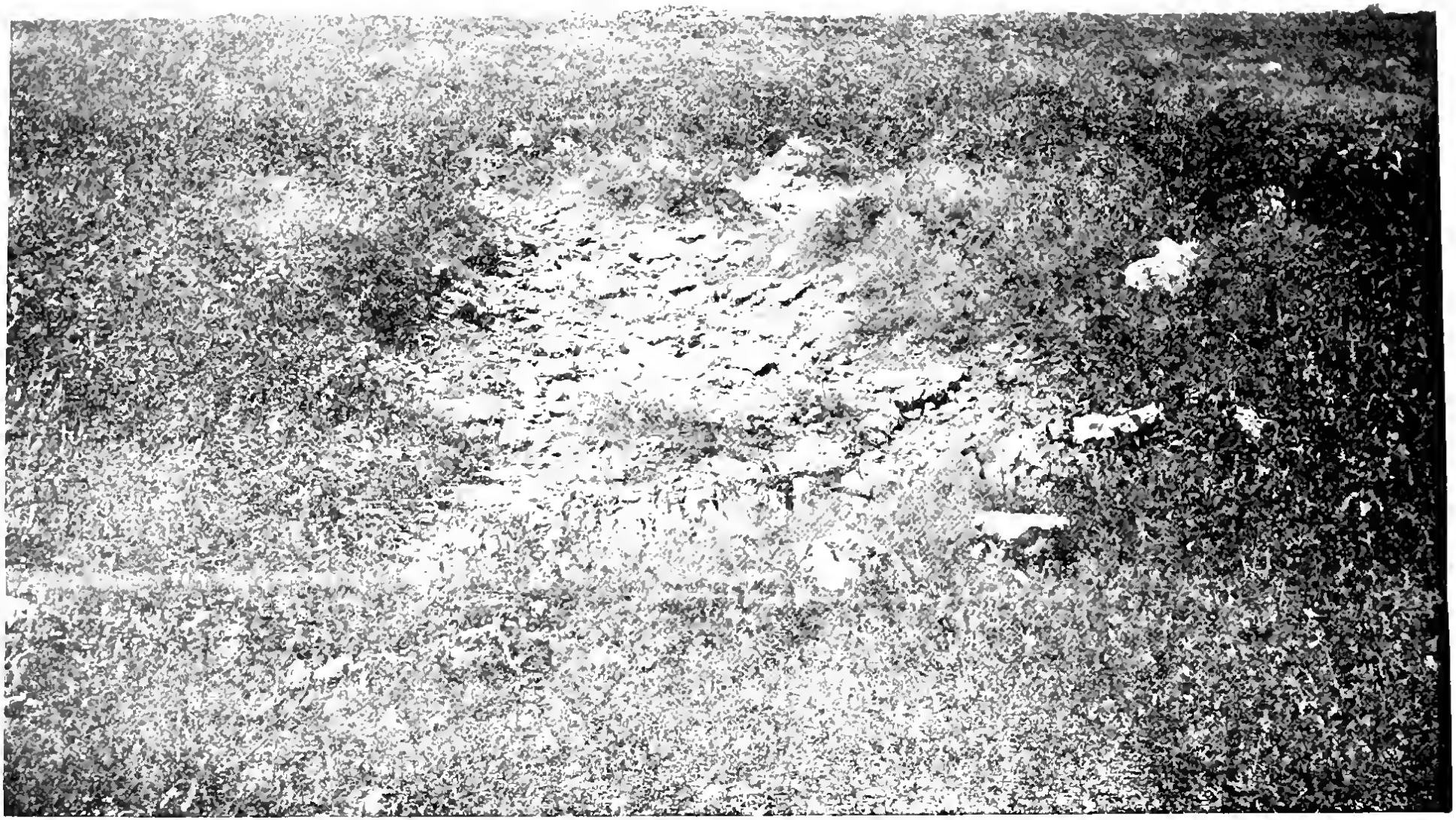
[Endorsed]: Plaintiff's Exhibit No. 3. F. L. Hatch, Dep. C. U. S. vs. Hon. Plan. Co.

[Endorsed]: No. 896. In the United States Circuit Court of Appeals for the Ninth Circuit. Plaintiff's Exhibit No. 3. Received September 29, 1902. F. D. Monckton, Clerk. By Meredith Sawyer, Deputy Clerk.

[Endorsed]: Plaintiff's Exhibit No. 4. F. L. Hatch, Dep. C. C. S. vs. Hon. Plan. Co.

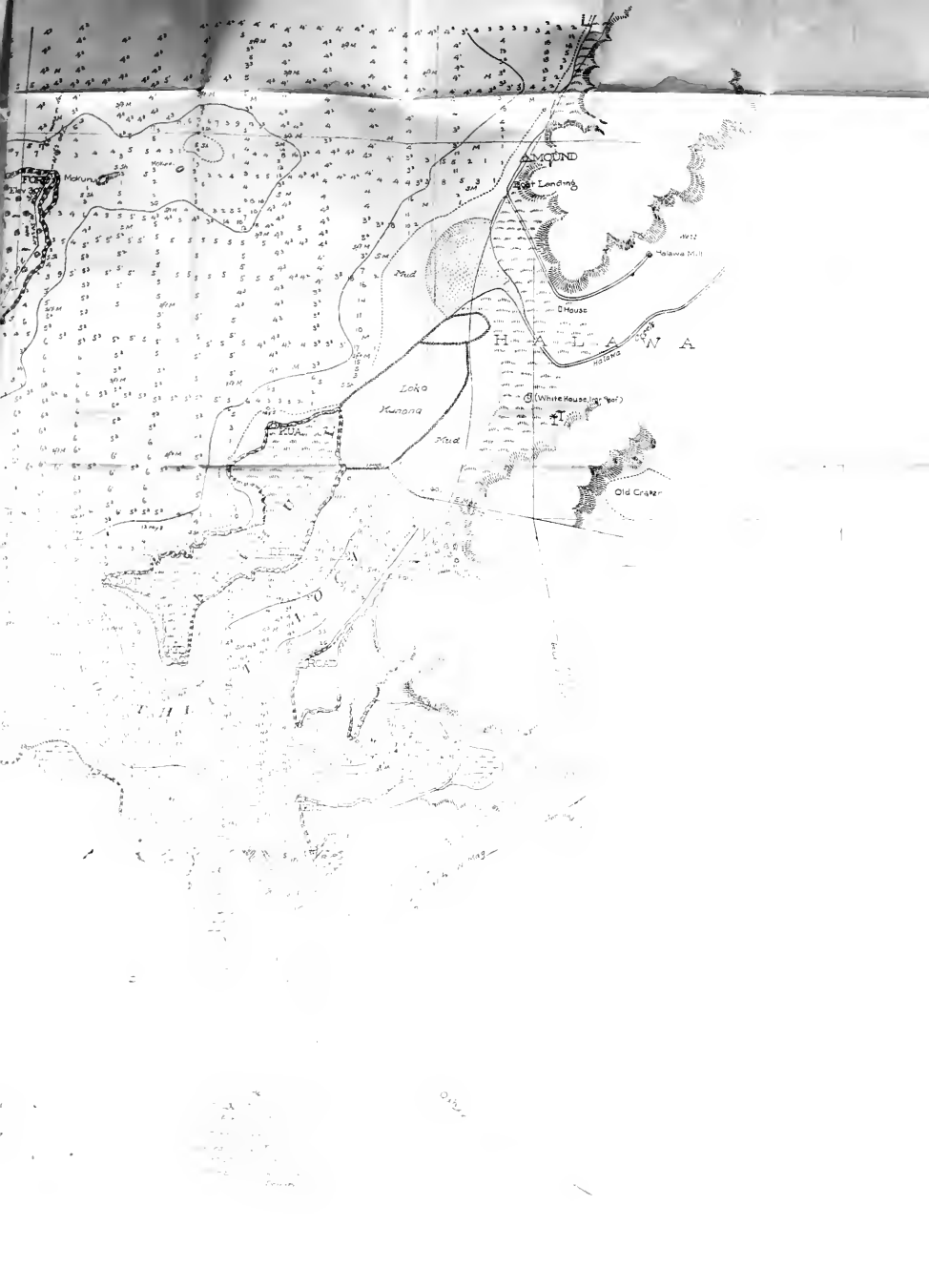


[Endorsed]: Plaintiff's Exhibit No. 5. F. L. Hatch, Dep. C. U. S. vs. Hon. Plan. Co.



[Endorsed]: Plaintiff's Exhibit No. 6. U. L. Hatch Dep. C. U. S. vs. Hon. Plan. Co.


WAIPIO
Boat Landing


MOUND
Landing
Halawa Mill
House
H A L A W A
Halawa
Loko
Kuhona
Mud
Mud
(White House, Iao Valley)
Old Crater

Memoranda for the Information of Taxpayers.

The Several Deputy Assessors will be present at the several times and places during January, 1900, mentioned in the local notices, to Receive Tax Returns.

ASSESSMENT AND OTHER DATES.

SECTION 2. January 1 All property except growing rice shall be assessed as of the first day of January each year.

January 1. All personal and dog taxes shall be assessed as of, and be due and collectable on and after the first day of January each year.

January 1-30. All taxpayers shall make returns of their property and the value thereof between the first and the thirtieth days of January of each year.

March 31. All personal and dog taxes which shall remain unpaid on March 31st of each year shall thereby and thereupon become delinquent and ten per cent. of the amount thereof shall be added thereto and become due as a part thereof.

May 1 Growing rice shall be assessed as of the first day of May in each year.

July 1-15. The assessment books shall be made up on or before July 1st, and shall be open to inspection from the first to the fifteenth of July of each year, notice of which shall be given.

July 1-20. In order to be entitled to appeal, any persons desirous and otherwise entitled to appeal from any assessment, shall file a notice of appeal at any time from the first to the twentieth of July of the year in which the assessment is made.

August 1-20. The Tax Appeal Court shall sit for the hearing of tax appeals between the first and the twentieth of August of each year.

September 1. Tax lists shall be made up by assessors on September 1st, and all property Taxes shall be payable on and after September 1st of each year, but may be received by the Assessors at any earlier date after assessment. No change shall be made in the assessment after September 1st except to add thereto property or taxes omitted therefrom

September 1-November 15. From September 1st to November 15th of each year Assessors shall attend at an advertised place for collection of taxes, the advertisement to contain notice that taxes will be delinquent on November 15th.

November 15. All property taxes which shall remain unpaid on November 15th of each year, shall thereby and thereupon become delinquent, and ten per cent of the amount thereof shall be added thereto and become due as a part thereof

December 1. All names and amounts due of Taxpayers delinquent on December 1st will be published.

December 1-30. During December of each year each assessor shall advertise for tax returns to be made during the following January. The Board of Equalization shall also meet during December.

PERSONAL AND SPECIFIC TAXES.

Poll tax one dollar; School Tax: two dollars; Road Tax two dollars On every male inhabitant between the ages of twenty and sixty years.

Vehicles.—For carrying merchandise, and brakes: two dollars each; for carrying persons: five dollars each.

Dog Tax—Males, $1 each, females, $3 each.

DEFINITION OF REAL PROPERTY.

The term "Real Property" for the purposes of this Act shall mean and include lands, and town lots and house lots with the buildings, structures, fences, wharves, improvements and other things erected on or affixed to the same.

DEFINITION OF PERSONAL PROPERTY.

The term "Personal Property" for the purposes of this Act shall mean and include all household furniture and effects, jewelry, watches, goods, chattels, wares and merchandise, machinery, Hawaiian ships or vessels whether at home or abroad, all moneys in hand, leasehold and chattel interest in land and real property, franchises, patents, contracts, growing crops, public stocks and bonds not exempted by law from taxation, and all animals not herein specifically taxed.

BASIS OF VALUE FOR TAXATION PURPOSES.

Except as otherwise specifically provided, the interest of each person in real or personal property is assessed at one per cent. on the full cash value thereof.

BASIS OF VALUE OF BUSINESS ENTERPRISES.

* * * In all cases where real and personal property, or several classes or kinds or parcels of real or personal property respectively are combined and made the basis of an enterprise for profit, the combined property forming the basis of such enterprise for profit, shall be assessed as a whole on its fair and reasonable aggregate value.

In estimating the aggregate value of such enterprise for profit, there shall be taken into consideration.

(1) The net profits made during the preceding year;

(2) The gross profits made during the preceding year;

(3) The actual running expenses of the enterprise during the preceding year

(4) In case of a corporation, the market price of its stock; and

(5) All facts and considerations which reasonably and fairly bear upon such valuation.

EXCLUSIONS FROM AGGREGATE VALUE.

In estimating the aggregate value of a business enterprise for purposes of taxation, all shares held in other Hawaiian corporations and property on which specific taxes are levied, are excluded.

THE BASIS OF VALUE OF LEASED PROPERTY

Is the sum of eight years' rental, unless such valuation is manifestly unfair or unjust.

DUTIES AND LIABILITIES OF AGENTS, TRUSTEES, EXECUTORS, SECRETARIES, TREASURERS, ETC.

Every agent for any person temporarily or permanently absent from the Republic, and every trustee, treasurer, executor, administrator or guardian, shall make returns for taxation, and be assessed separately in respect of each property or trust which he represents, and shall be chargeable with the tax payable in respect thereof in the same manner as if such property were his own.

Each such assessment shall be kept separated and apart from his individual assessment.

COMPANY RETURNS

Shall be made by the President, Treasurer, Secretary or Manager of a corporation, or by some member of a copartnership.

CORPORATION AND FIRM PROPERTY

Is assessed to the corporation or firm, and shares therein are not assessed to the owners thereof.

PENALTY FOR DELINQUENCY.

Personal and dog taxes become due January 1st, and are subject to a delinquent penalty of ten per cent. after March 1st.

Property taxes are due September 1st, and become subject to a delinquent penalty of ten per cent. after November 15th.

EXEMPTION FROM PROPERTY TAX.

Provided, however, that the tax of one per cent. herein imposed upon property shall be collected only upon property in excess of the value of three hundred dollars, be the same real or personal.

Such exemption shall be allowed in but one taxation district of the Republic, and that taxation district shall be the one in which the property-owner resides.

And further provided, that no exemption shall be allowed from the property of corporations, companies, estates of deceased persons or corporations.

And further provided, that a tenant, lessee or occupier of any real property that is exempt from taxation, shall not by reason thereof be exempt from taxation, but shall be assessed and shall be subject to taxation, in respect to the value of his interest in any such real property.

RIGHT OF EXAMINATION FOR PURPOSES OF TAXATION.

For the purpose of properly assessing and listing property for taxation the assessors shall each have the right and power

To inspect and examine the records of all public offices, without charge.

To enter, after making known his intention to the owner or occupier thereof, and examine, so far as is necessary to ascertain their value, all buildings, premises or property whatsoever, except dwelling houses.

To examine under oath any person or persons whom he may suppose to have a knowledge of any property liable to taxation, or in whose hands money or property may be on deposit.

TAX RETURN REQUIRED TO BE MADE.

Each person liable to pay taxes and every owner or possessor of any property, real or personal, whether entitled to exemption or not, shall in the month of January of each year give in to the Assessor or Deputy Assessor of the district in which said property is located a written or printed taxation return, signed and sworn to by him, enumerating the following facts, viz.:

1. The description, situation, and value of the real and personal property subject to taxation belonging to such person, including moneys deposited with trustees, agents or other persons of every kind, and from every source, or of which such person had the possession, custody or control on the first day of January then being or immediately preceding.

2 All leases, mortgages, incumbrances and charges secured thereon respectively, with the names and residences of the persons to whom such leases, mortgages, incumbrances or charges are made or owing.

3. All animals subject to taxation which were in the possession, custody, or control of the person making the return on the first day of January.

4 The names and nationalities of all persons subject to taxation in the employ of such persons on the said first day of January.

If any of the property by this Act directed to be returned shall consist of real and personal property, of several classes or kinds or parcels of real or personal property, respectively, which are combined and made the basis of an enterprise for profit, the person making the return shall give a detailed description of such property and state the aggregate value thereof, taking into consideration the net profits made by the same, also the gross receipts and actual running expenses, and where it is a company, being a corporation whose stock is quoted in the market, the market price thereof, as well as all other facts and considerations which reasonably and fairly bear upon such valuation

He shall state what, if any, the net profits as well as the gross proceeds and actual running expenses of such enterprise have been during the twelve months next preceding; and if known what sale or sales of stock or other interest in such enterprise have taken place during the twelve months next preceding, giving the names of the person selling, the person buying the number of shares or proportion of interest sold upon each sale; and when known, the purchase price thereof.

PENALTY FOR FAILURE TO MAKE SWORN RETURN.

The Assessor will make his own assessment, which shall not be subject to appeal.

INSPECTION OF ASSESSMENTS AND APPEAL.

Assessments are open to inspection between July 1st and 15th.

Any person who has made a tax return can appeal to the Tax Appeal Court from any change in his assessment by depositing costs with the Assessor.

An appeal lies from the Tax Appeal Court to the Supreme Court

Value of land is to be assessed separate from the value of buildings and improvements.

In making a return, state the street and number of lots in town. Lots in the country shall be described by noting the name of Ili and Ahupuaa in which they are situated, and the number of the Land Commission Award and Royal Patent under which the land is held. Also, state if any property has been sold during the year, to whom, and at what price.

Under Leasehold Interests a schedule must be given of all Leases, their term, rental and unexpired term.

Growing crops of all kinds except coffee are taxable.

All Schedules attached to this return are a part hereof, and must be filled out.

Consignments of property, wherever from, in or out of bond, are to be taxed there.

All Taxes amounting to over $10.00 are payable in U. S. Gold Coin.

APPROVED:

THEO. F. LANSING,

Minister of Finance.

[Do not include growing rice on this list. It is to be assessed May 1st on a separate blank which will be furnished for that purpose.]

1900
TAX ASSESSMENT LIST

FOR THE

DISTRICT OF Ewa, *ISLAND OF* Oahu

Statement of Property Belonging to, in the Possession of, or Under the Control of

HONOLULU PLANTATION CO.

(1) REAL ESTATE OWNED.

No. R. P. or L. C. A.	Description and Situation of Land and Improvements.	Area.	Irrigated Cane Land Value per Acre	Unirrigated Cane Land Value per Acre	Pasture Land Value per Acre	Rice or Taro Land Value per Acre	Forest Land Value per Acre	Total Value of Land	Total Value of Improvements.	Grand Total
	As per Schedule "C"	112½	*acres*					$ 12,755.00	$	$
	Buildings								31,075.00	
										$43830.00
Total of Real Estate								$	$	$

(2) LESSEES RETURN OF REAL ESTATE LEASED.

R. P. or L. C. A.	Area.	Name and Location of Land and Improvements	Lessor	Date of Lease	Term of Lease	Annual Rent	Value of Leasehold Interest	Value of Improvements	Grand Total
							$	$	$
		As per Schedule "B"					50,000.00		
		Buildings						19095.00	
		As per Schedule "B" on lands belonging to Sundry Lessors, we paying taxes						4264.00	
Total							$	$	$ 73359.00
Grand Total							$		$117189.00

NAME OF INSURANCE COMPANY	AMOUNT OF PREMIUMS
Scottish Union & National, "The Alliance," "The Royal"	
Insurance on Buildings on Fee Simple Lands, 31075.00	$
" " " " Leasehold " 19095.00	
Insurance on Lumber $7000.00, Insurance on R. R. Bridges $8000.00	

Form 3-1000-99

SCHEDULE A.

GROWING CROP OF CANE.

BELONGING TO *Honolulu Plantation Company.*

NO. OF ACRES	DESCRIPTION	VALUE		ESTIMATED YIELD IN TONS OF SUGAR		REMARKS
		Per Acre	Total	Per Acre	Total	
338½	*Young Plant Cane*					
	4 Months old @	30.00	10,155.00	7	2369½	
289	*Young Plant Cane*					
	on high lands					
	2½ months old @	25.00	7,225.00	6½	1878½	
250	*Young Plant Cane*					
	on high lands					
	7 weeks old @	20.00	5,000.00	6½	1625	
127	*Young Plant Cane*					
	on high lands					
	4 weeks old @	15.00	1,905.00	6½	825½	
120	*Young Plant Cane*					
	on low lands					
	2 weeks old @	10.00	1,200.00	7	840	
50	*Young Ratoons*					
	on low lands					
	3½ weeks old @	15.00	750.00	6½	325	
10	*Large Seed Cane*					
	8 months old	100.00	1,000.00	——	——	
1184½			27,235.00			

Lease of S. M. Damon No. 607 Acres at $9.000 per year for 20 years seemingly not reported.

See Fol. 190—475.

Form 4-1000-99

SCHEDULE B

LANDS LEASED BY

HONOLULU PLANTATION CO.

Lands on which Taxes are Paid to be so Designated.

No. R. P.	No. L. C. A.	NAME OF LAND	LESSOR	No. Acres	Rent Per Acre	Year	Value of Lands.	EXPIRATION OF LEASE Month
709	1996	Naca	Napuelua	2.20		50.00	400.00	Aug. 1st 1918
738	2006	Kenui	Kaapuni et als.	.70		13.00	104.00	Dec. 1st 1926
702	2042	Ka ohilo	Lupina & Haupenu	.25		20.00	160.00	" 29th 1923
	2044	Kanpali	Halualani	1.03	Kapunai			
	2046	Mahakani	"	.32	"	30.00	240.00	Nov. 3rd 1918
	2057	Keawe No. 1.	"	.30	"			
770	2037	Keawe No 2.	K Williams et al	.35	Ap No. 2			
707	2055	Kahauwahia	"	1.00	" 1 & 2	60.00	480.00	Oct 1st 1910
700	2058	Kauhalu	"	.77	" " "			
Halawa	*	Queen Emma Land	Jas. I. Dowsett	47.82		$1000.00		Sept. 1st 1908
"	*	Bishop Est "	"	0574		$1000.00		" " "
"	*	Queen Emma Est.	Do. & Queen Emma Est.	300.00	1.75			" " 1932 1/2 per cent of crop
"	*	Bishop Est.	Do. & Bishop Est.	1000.00	1.75			" " " "
Aiea	*	Crown Land	Jas. I. Dowsett	198.00	1.75			Dec 31st 1912
Kalauao	*	Bishop Est	S M Damon & G. Silver	60.00	1.75			Febry. 1st 1914
"	*	" "	McCandless & Bishop	712.00	1.75			Jan 1st 1932 3/4 per cent of crop
Waiau	*	C M Cooke	Do & C M Cooke	80.00	1.70			" " 1918
Waimalu	*	Ayston Estate	M. Candless & Austin Est	300.00	1.70			Jan. " 1932 3/4 per cent of crop
Kalauao	*	M. Grew	J S McGrew	22.50	15.00			Nov. 5th 1918
	*	Waiau	O R. & L Co					July 1st 1932
	*	Waiawa	Do	120.00	1 3/4 of			" " "
	*	Waiawa	Do		Crop			" " "
	*	Waimanamka	Do	140.00				Feb 22nd 1919
	*	Manana	Do	150.00				July 1st 1923
		Keawe	Kaapuni	2.00				May 1st 1932 1/2 Int
765	2156	Halawa	Kahanahookahi	1.74		50.00	400.00	Jan 1st 1929
	763	Kaiwaha	W R. Castle "Prentice"	27				" " 1924
	2012	Kauhilo	" "					"
	2025	Kapalea, Ewa	Melani (W)					" " 1915
	2076	Mawaunui	Sing Chong					" " 1925
	2077	Howaa Kawaa	Mary Kapilokalani					" " 1925
	1077	Waiawa Ewa	Alona					" " 1924
	777	" "	Mahelulu					" " 1925
	2032	Manaaiki	H. Poahiki					" " 1925
Govt Lease No	417	"	Hawn Government	3.48				Dec 31st 1916
	2028	Kapalea Ewa	Ho Sun					July 24th 1903
		Manawaiki & Hawaa	Do (Bishop Est)	37.00				Jan 1st 1923
	2030 & 2031	Keoha & Keiki	Do					" " 1923

Amt of Taxes on Leased Lands to be paid by Plant Co

$ 204.00

* All the Lands mkd * taxes to be paid by Lessors and owners and charged

Form 5-1000-09

SCHEDULE C.

Lands Held in Fee Simple by

HONOLULU PLANTATION CO.

No. R. P.	No. L. C. A.	NAME OF LAND	Acres Forest Land	Acres Cane Land	Acres Pasture Land	Total Acreage	REMARKS Value
761	2139	Halawa		1		1	300.00
Grant on Cash Purchase	4270	Aiea, Ewa		95	(Mill Site)	98	10,000.00
757	2155	Halawa		—		2	Halawa 600.00 Pump Site
5597	Apane 2 70	Waimalu		1		1	500.00 Rice Land
Grant by Rep. of Hawaii		Waimalu		2¼		6 25/100	550.00
Do.	Do.	Do.				2 41/100	250.00 Rt. of Way for R.R.
Deed by Austin Est.		Do.				1 84/100	Waimalu 550.00 Pump Site
						112½	$12,755.00

Form 6½—1M—1900

SCHEDULE E.

Information required in estimating aggregate value combined property which is the basis of Business Enterprises for Profit, required by Section 68. Session Laws, 1896.

STATEMENT OF PAST YEAR'S BUSINESS	
Amount Gross Receipts for year to January 1st, 1900	$.....
.....	.....
Total Actual running expenses for year to January 1st, 1900	74893.09
which includes Cost of Railroads, Pumps, Buildings and all purchases during year, and all outlays for Labor, as well material now on hand	.....
Amount Net Profits for year to January 1st, 1900	.....
.....	.....
.....	.....
.....	.....

SALES OF CORPORATION STOCK.

Name of Vender.	Name of Vendee.	No. Share.	Price Paid	Total.
.....	.....	.....	.....	.....
.....	.....	.....	.....	.....
.....	.....	.....	.....	.....
.....	.....	.....	.....	.....
.....	.....	.....	.....	.....
.....	.....	.....	.....	.....
.....	.....	.....	.....	.....
.....	.....	.....	.....	.....
.....	.....	.....	.....	.....
.....	.....	.....	.....	.....

REMARKS.

No Receipts and no Profits

DESCRIPTION OF PERSONAL PROPERTY.	VALUE.
Agricultural Implements on hand. *Steamplows, $20,000.00; Tools, $5,000.00*	$ 25,000 00
Building Material on hand *Lumber, 7,000.00 Blksmith Iron, $890.79*	7,890 79
Cash in hand	182 28
Coal—Tons *1100 Tons @ $7.00*	7,700 00
Fishing Rights	
Growing Crop of Cane, as per Schedule "A"	27,335 00
Growing Crop of Taro, Bananas and Vegetables—Acres	
Goods, Wares and Merchandise, and of what general kind (on hand). *Store Stock*	2,773 84
" " " " " " " *Cement & Lime*	8,000 00
" " " " " " (in bond) *Rails & Spikes*	8,200 00
" " " " " " " *Hay & Grain*	248 70
" " " " " " consigned to you, in or out of bond	
Household Furniture (in use) *and Office Furniture*	500 00
Hides or Skins, in or out of bond	
Jewelry of all kinds for personal use (including Watches)	
Machinery of all kinds in use (other than sugar) *Pump Mach., $14,000.00; Well Boring Mach., $1,000.00*	100,550 70
Sugar or Molasses, in Tanks or Coolers ..tons..gallons.	
Sugar or Molasses on hand ..tons.	
Paddy—Tons ..Value per ton, $	
Personal Property of any kind, not included in this Schedule	
Railroads—Miles. *3 incomplete 1 laid* Value $ *70,000.00* Portable Tracks—Miles. Value $ *5,200.00*	75,200 00
Rice—Tons ..Value per ton $	
Rolling Stock *18 Cane Cars, 4 Stone, 30 Dump Cars, 50, 1 Lucomo, 3,500, Car Material, 1,400*	10,000 00
Sugar Mills and Machinery	
Ships, Vessels, at home or abroad	
Wool—Tons ..Value per ton $	
Yachts and Boats	

(3) LIVE STOCK SCHEDULE.

	NUMBER	VALUE PER HEAD	
Bulls (Hawaiian)		$	
" (Imported)			
Cattle (Herd)			
Cattle (Working)			
Cattle (milch cow)			
Horses (Native) broken	8	60 00	480 00
Horses (Foreign) broken			
Horses (herd) unbroken			
Stallions (Native)			
Stallions (Imported)			
Jacks, Imported and Native			
Donkeys (Native)			
Mules (Native)			
Mules (Foreign)	141	100 00	14,100 00
Sheep			
Pigs			

Total of Personal Property	$ 306,453 01
Total of First Page	112,184 00
Grand Total	518,637 01

Aggregate value of the combined property which is the basis of the business enterprise known as. *Honolulu Plantation Co.* $ .....

taken as a whole

(1) If this blank is not large enough make this return on Schedule C.
(2) If this blank is not large enough make this return on Schedule B.
(3) If this blank is not large enough make this return on Schedule D.

SPECIFIC TAXES.

Number of Carriages, Wagons, Wagonettes, Hearses, Omnibusses used for conveyance of persons.....

1 Buggy. ....

Number of Wagons, Carts, Dreys or other Vehicles used for freight only; and brakes ....*9 carts and wagons*.....

Dogs—Male .....

Dogs—Female .....

LIST OF MALE PERSONS IN YOUR EMPLOY, OR RESIDING WITH YOU SUBJECT TO TAXATION.

NAME.	AGE.	NATIONALITY.	NAME.	AGE.	NATIONALITY.

I DO SOLEMNLY SWEAR that the list of persons in my employ, and of animals and other property in my possession, or owned by me liable to taxation, which I have given, is true to the best of my knowledge, information and belief, so help God.

HONOLULU PLANTATION CO.

By JAMES A. LOW, Manager.

Subscribed and Sworn to before me this ....*31st*..... day of January, 1900.

F. K. ARCHER,

Deputy Assessor and Collector.

BLANKS BELOW FILLED OUT AT TAX OFFICE.

HAWAIIAN ISLANDS

Tax Assessment List

FOR THE

District of *Ewa*

Island of *Oahu*

1900.

STATEMENT OF

Honolulu Sugar Co.

Bank

Block

Received Jan'y *31* *1900.*

F. K. ARCHER,

Deputy Assessor and Collector.

U. S. Dist. Court.

U. S. vs. Bishop et al.
(Hono. P. Co.)

Plffs. Ex. "A"

W. K. Maling,
Clerk.

U. S. Dist. Court.

U. S. vs. Hon. Plan. Co.

Plffs. Ex. No. 9.

F. L. Hatch,
Dep. Clerk.

No. 898

In the Circuit Court of Appeals
For the Ninth Circuit.

Plaintiff's Exhibit
9

Received SEP 29 1902
F. D. Monckton, Clerk.
By Wendell Sawyer,
Deputy Clerk

CIFIC TAXES.

nibusses used for conveyance of persons.....	.....
.....	.....
d for freight only; and brakes.....	*9 carts and wagons*
.....	.....
.....	.....

Y, OR RESIDING WITH YOU SUBJECT TO TAXATION.

TY.	NAME.	AGE.	NATIONALITY.

of persons in my employ, and of animals and other property in ich I have given, is true to the best of my knowledge, informa-

ULU PLANTATION CO.

By JAMES A. LOW, Manager.

ıy of January, 1900.

F. K. ARCHER,

Deputy Assessor and Collector.

BLANKS BELOW

HAWA

Tax As

District of.....

Island of.....

Plaintiff's Exhibit No. 11.

Lease.

[Four Hawaiian Stamps. Canceled.]

This indenture made this first day of August, A. D. 1898 by and between J. M. Dowsett of Honolulu, Island of Oahu, Hawaiian Islands, administrator of the estate of James I. Dowsett late of said Honolulu, deceased, party of the first part; and The Honolulu Sugar Company, a corporation, incorporated under the Laws of the State of California, United States of America, doing business in the Hawaiian Islands, party of the second part

Witnesseth

That the party of the first part being possessed of certain portions of the Ahupuaas of Halawa and Aiea, situate in the District of Ewa, in said Island of Oahu, under and by virtue of a lease from the Trustees of the Estate of Bernice P. Bishop to decedent dated the first day of September A. D. 1888, and recorded in the Registry of Deeds in said Honolulu, in Book 115 page 6 which lease expires on the First day of September A. D. 1908 and by virtue further of a lease from the Trustee of the Estate of Emma Kaleleonalani to decedent dated the Eighth day of September 1888 and recorded in said Registry of Deeds in Book pages and expiring the first day of September A. D. 1908 and by virtue further of a lease from the Commissioners of Crown Lands owned by decedent at his death dated the first day of January 1882 and recorded in said Registry of

Deeds in Book pages and expiring the 31st day of December 1912 in consideration of Twenty Thousand Dollars ($20,000.) to him the lessor, paid by the party of the second part, the receipt whereof is hereby acknowledged, and with the approval of A. Perry judge of the Circuit Court of the First Circuit under proceedings had this day in the matter of the estate of said decedent and in order to raise money to pay debts of decedent's estate and by virtue of every power him hereto enabling doth hereby sell and sublet to the party of the second part the following portions of said lease holds:

Those portions of the Ahupuaas of Halawa and Aiea respectively which lie mauka of the present track of the Oahu R. R. and L. Co. and described as follows: beginning at the intersection of said railroad track and of the southeasterly boundary line of the land belonging to the estate of Queen Kaleleonalani above mentioned, running thence along said railroad track northwesterly to the intersection of said track with the northwesterly boundary of the land of Aiea aforesaid; thence along said boundary of Aiea northeasterly to a point of altitude of 650 feet mauka of said track; thence in a southeasterly direction along a line at 650 feet altitude on the ridges mauka of said track to a point in the southeasterly boundary line of the Ahupuaa of Halawa, lying at an altitude of 650 feet on the ridge mauka of said track; thence southwesterly along southeasterly boundary line of Halawa to the point of commencement.

Also that piece of Halawa land lying below the O. R. & L. Co.'s track described as follows: Beginning at a point on sea shore at Railroad fence and running as follows by true bearings

1. S. 4° 40′ E. 800 feet along R. R. fence.

2. S. 32° 00′ E. 1520 feet along R. R. fence to 40 foot road.

3. S. 47° 00′ W. 4000 feet along 40 foot road.

4. S. 79° 50′ W. 1940 feet along Queen Emma Estate

5. N. 33° 00′ W. 6270 feet along Queen Emma Estate and Bishop Estate to shore, thence along sea shore to the initial point the direct bearing and distance being S. 87° 50′ E. 7650 feet and containing an area of 780 acres.

Excepting therefrom all lands under the following leases rented to parties at the present time, and described as follows:—

Halawa.—1. Lease dated September 28th, 1888, for period of twenty years from 1st day of September, 1888 to Chun Lau Cheong, and seven others, assigned to Y. Ahin, 16th Nov. 1896, containing 47 and 82|100 acres.

2. Lease dated 31st Jan. 1889 to Chulan & Co. for twenty years from 1st day of Sept. 1888 assigned to Wong Kwai, Nov. 30th, 1896, containing 66 and 74|100 acres.

3. Lease dated Nov. 27th, 1897, for a period of ten years from 1st day of Sept., 1898, to Chow Ah Fo, containing 17 and 92|100 acres.

Aiea.—1. Lease to Kam Tow of land suitable for planting rice, ten year lease from 1st Jan. 1898.

2. Lease to Hop Sing Co. the same now being held by Sung Kong Lee, containing three acres, more or less, being used as a fish station at Aiea depot, bringing a rental of $100 paid annually on Oct. 1st of each year.

And also such part of the Makalepa paddock in the Ahupuaa of Halawa aforesaid as is not arable, and which is fit for pasturage only.

And the party of the first part doth grant unto the party of the second part all waters running during the continuance of this Indenture in and through the gulches on any portions of said lands lying mauka or above the mauka boundary of the demised premises which runs at an altitude of 650 feet above the level of the sea and also the right to build water-heads, flumes, ditches and pipes above the said mauka boundary line and to extend the same to the lands hereby demised and to run water therein, reserving however, to the party of the first part the right to use and take out of the said waters sufficient for watering all stock which the party of the first part or those claiming under him may run and maintain on the lands situated mauka of the said 650 feet line whenever such water may be available and further excepting and reserving to the party of the first part and those claiming under him a right of way to drive and move cattle over the premises hereby demised upon a road to be hereafter fixed and designated by the Lessee.

To have and to hold the sublet premises and rights according to and for the residue of the respective terms of the said leases above enumerated under which the party of the first part himself is holding and which severally cover the same, the consideration aforesaid of twenty thousand dollars being rental and payment in full for the full term of this sublease of all lands, rights and privileges sublet and assigned hereby, the party of the first part hereby covenanting and agreeing to and with the party of the second part, its successors and assigns, that he will pay to the said Trustees of the Estate of Bernice P. Bishop and his other lessors here-

inabove enumerated, all rentals severally reserved in the leases aforesaid to the several lessors aforesaid and will otherwise keep and perform all of the covenants and conditions in said original leases contained; and will not commit or suffer any acts to be done whereby the same shall be forfeited; and irrespective of any surrender or new lease of that portion of the Estate of said Emma Kaleleonalani covered by this sublease, will pay to the said Trustee of said last named estate for the residue of the premises still retained by the party of the first part the full rental reserved in his said lease from the Trustees of said Estate without deduction or claim whatsoever for or on account of the part hereby sublet or any surrender of new lease thereof. The party of the second part covenants that it will erect and maintain good legal fences around the sublet premises, and will indemnify and forever hold the party of the first part and those claiming under him harmless for all trespass of stock on the lands of the party of the second part except trespasses occurring through the wilful neglect of the party of the first part, or those claiming through him.

In witness whereof the parties hereto have to this and to another instrument of like date and tenor set their hands and seals the day and year first above written.

J. M. DOWSETT,
Admin. Est. J. I. Dowsett, Deceased.
HONOLULU SUGAR CO. [Seal]
By Its Attorney in Fact and General Manager,
JAMES A. LOW.

Hawaiian Islands, } ss.
Island of Oahu. }

On this 2nd day of August, A. D. 1898, personally appeared before me, J. M. Dowsett, Administrator of the Estate of J. I. Dowsett, and the Honolulu Sugar Company, a corporation, by James A. Low, its attorney in fact and manager, known to me to be the persons described in and who executed the foregoing instrument, who severally acknowledged to me that they executed the same freely and voluntarily for the uses and purposes therein set forth as such administrator and as attorney in fact respectively.

[Seal] HARRIET E. WILDER,
Notary Public.

[Endorsed]: Lease No. 1. J. M. Dowsett, Administrator Estate J. I. Dowsett, Deceased, to Honolulu Sugar Co. Dated Honolulu, Aug. 1st, 1898. Indexed. Register Office, Oahu—ss. Received for record this 17th day of August, A. D. 1898, at 12:48 o'clock P. M. and recorded in Liber 184, on pages 291 to 293, and compared. Thos. G. Thrum, Registrar of Conveyances. By ———— Deputy Registrar. Recording Fees, $8.50.

U. S. Dist. Court. U. S. vs. Bishop et al (Hono. P. Co.) Plffs. Ex. "D." W. B. Maling, Clerk.

U. S. Dist. Court. U. S. vs. Hon. Plan. Co. Plaintiff's Ex. No. "11." F. L. Hatch, Dep. Clerk.

No. 896. United States Circuit Court of Appeals for the Ninth Circuit. Plaintiff's Exhibit No. 11. Received September 29, 1902. F. D. Monckton, Clerk. By Meredith Sawyer, Deputy Clerk.

Plaintiff's Exhibit No. 12.

Lease.

[One U. S. Int. Rev. Stamp and Four Hawaiian Stamps.]

THIS INDENTURE OF LEASE, made this First day of October, A. D. 1898, by and between W. F. ALLEN, SAMUEL M. DAMON, JOSEPH O. CARTER, W. O. SMITH and C. M. HYDE, all of Honolulu, in the Island of Oahu, Republic of Hawaii, Trustees under the Will of Bernice P. Bishop, hereinafter called the Lessors, of the first part, and the HONOLULU SUGAR COMPANY, a corporation, incorporated under the laws of the State of California, doing business in said Republic, hereinafter called the Lessee of the second part,

WITNESSETH: That the Lessors, in consideration of the rent hereinafter reserved and of the covenants herein contained and on the part of the Lessee to be kept and performed, do hereby demise and lease unto the Lessee all of those portions of the one-half portion of the Ahupuaa, of Halawa, situate in the District of Ewa, in said Island of Oahu, set apart to the Trustees of the Estate of Bernice P. Bishop, by deed dated June 13th, 1888, and recorded in the Hawaiian Registry of Deeds in said Honolulu, in Book 113, pages 14, 15, 16, and 17, described as follows, to wit:

PART 1.

Lying mauka of the present right of way of the Oahu Railway and Land Company:

Beginning at a point on the mauka line of the right of way of the Oahu Railway, at the boundary line be-

tween Halawa sections A and B, and running as follows by true bearings:

1. N. 56° 25′ E. 6,000 feet along Halawa section B.
2. N. 36° 20′ W. 500 feet along Halawa section B.
3. S. 56° 30′ W. 1,500 feet along southeast side of crater,
4. N. 45° W. 1,500 feet along southwest side of crater,
5. North 1,000 feet along west side of crater,
6. N. 50° E. 1,140 feet along northwest side of crater,
7. N. 36° W. 250 feet to the middle of Halawa Creek,
8. S. 63° W. 2,040 feet to the mauka line of said right of way.
9. Southerly along said mauka line to the initial point, containing an area of 205 acres.

PART 2.

Lying mauka of the present right of way of the Oahu Railway and Land Company.

Beginning at a point on the mauka line of the right of way of the Oahu Railway at the boundary line between Halawa and Aiea, thence

1. Southerly 2,830 feet along said mauka line or right of way to a point opposite the northerly end of the bridge across Halawa Creek.
2. S. 65° E. 500 ft.
3. N. 74° E. 400 ft.
4. N. 42½° E. 800 ft.
5. N. 26° E. 380 ft.
6. N. 26° W. 430 ft.
7. N. 50° E. 1,300 ft.
8. N. 78° E. 1,650 ft.
9. S. 22° E. 550 ft. to the middle of Halawa Creek.
10. N. 48° E. 150 ft. along Halawa section B.

11. N. 60° 45′ E. 2,500 ft. along Halawa section B. to the Government Road.

12. Westerly 2,800 ft. along the Government Road to the boundary line of Aiea.

13. S. 57° 45′ W. 3,000 ft. along Aiea.

14. S. 68° 30′ W. 500 ft. along Aiea to the initial point, containing an area of 215 acres.

PART 3.

Lying mauka of said right of way of the Oahu Railway and Land Company.

Beginning at a stone on the northwesterly boundary of Halawa, thence,

1. S. 57° 45′ W. 200 ft. along Aiea to the Government Road,

2. Easterly 2,800 ft. along the Government Road to the boundary line of Halawa Section B.

3. N. 60° 45′ E. 7,100 ft. along Halawa Section B. to 650 ft. elevation,

4. Northwesterly 3,000 ft. along 650 ft. elevation to the boundary line of Aiea,

5. S. 61° 45′ W. 3,400 ft. along Aiea,

6. S. 52° 45′ W. 4,200 ft. along Aiea, to the initial point, containing an area of about 470 acres.

PART 4.

Lying makai of the said right of way of the Oahu Railway and Land Company.

Beginning at a point on the seashore joining the R. R. fence and running as follows by true bearings:

1. S. 4° 40′ E. 800 feet along R. R. fence,

2. S. 58° 50′ W. 5,850 feet along Queen Emma's land,

3. N. 33° 00′ W. 5,050 feet along Bishop estate to

shore, thence along sea shore to initial point. The direct bearing and distance being S. 87° 50′ E. 7,650 feet, and containing an area of 520 acres.

Also, all that portion of the Ahupuaa of Kalauao, including the Ili of Kaonohi, lying mauka of the Government Public Road, through said District of Ewa, and bounded and described as follows:

Beginning at a point on the boundary between Kalauao and Aiea, from which point the rock at the corner of Paaiau, Aiea and Kalauao bears S. 55° 30′ W. true 252 feet and running as follows by true bearings:

1. N. 55° 30′ E. 7,650 feet along Aiea to 650 ft. elevation.
2. N. 55° 20′ W. 3,900 feet along 650 ft. elevation to Waimalu,
3. S. 78° 30′ W. 900 feet along Waimalu,
4. S. 67° 00′ W. 3,100 feet along Waimalu,
5. S. 44° 50′ W. 1,400 feet along Waimalu,
6. S. 48° 00′ W. 1,650 feet along Waimalu to the old Government Road. Thence along the old Government Road to the intersection of the New Road at L. L. McCandless' gate. Thence along New Road as follows:
7. S. 40° 00′ W. 420 feet.
8. S. 55° 00′ W. 80 feet,
9. S. 4° 10′ W. 158 feet,
10. S. 65° 00′ E. 128 feet,
11. N. 88° 20′ E. 138 feet,
12. N. 59° 40′ E. 43 feet.
13. N. 87° 15′ E. 87 feet,
14. S. 76° 35′ E. 390 feet,
15. S. 57° 40′ E. 70 feet,

16. S. 43° 00′ E. 103 feet to fence on south side of stream,

17. S. 27° 00′ E. 120 feet,

18. S. 5° 15′ W. 111 feet,

19. S. 50° 27′ E. 65 feet,

20. S. 71° 00′ E. 450 feet,

21. S. 80° 50′ E. 70 feet along road,

22. N. 64° 00′ E. 230 feet along road,

23. N. 85° 30′ E. 245 feet to the initial point, and containing an area of 712 acres. All rights of Native Kuleanas reserved.

And also the right of, in and to, all the water running during the term of this lease, in and through the gulches and on the portions of said lands of Halawa and Kalauao owned by the Lessors lying above or mauka of the mauka boundary or line of the demised premises, said premises running up to an elevation of 650 feet altitude above the level of the sea;

And also the right to build and make water-heads, flumes, ditches, and lay all pipes upon the said Ahupuaas, above the said elevation and the said mauka boundary line, and to extend the same to and upon the demised premises and to convey water thereon, reserving, however, the right to the use of water by the Lessors for domestic purposes and for watering all stock which they or their tenants may run and maintain on their land situate mauka of the demised premises, whenever such water may be available, and excepting and reserving all fishing rights appurtenant to the demised premises, also all kuleanas, and rights of tenants; and excepting and reserving also to the Lessors a right of way to drive their cattle and stock of their tenants, and for all other

purposes, through both the Halawa and Kalauao lands heretofore specified to the lands bounded by and adjoining the lands hereby demised.

TO HAVE AND TO HOLD that portion of the demised premises described as Parts 1, 2, 3, and 4, for a term of thirty-two (32) years from the 1st day of September, A. D. 1908; and the balance of the demised premises for the term of thirty-four (34) years from the first day of January, A. D. 1906.

The Lessee, for itself, its successors and assigns, doth hereby covenant to and with the Lessors, their successors and assigns, that it, the Lessee, shall make full payment for rent of all the lands, tenements, hereditaments, rights and privileges, hereby demised and conferred, three and one-half (3½) per cent of the gross amount of sugar annually produced on the premises, to be packed in suitable containers and delivered to the Lessors on the railway cars at the mill of the Lessee, free of charge; provided, however, the annual rent so paid shall not be less than thirteen hundred thirty-three and 33-100 dollars ($1,333.33) per annum from January 1st, A. D. 1906, to September 1st, A. D. 1908, and not less than four thousand dollars ($4,000) net in any one year from or after September 1st, A. D. 1908, to the end of the term of this lease, all cash rentals payable on September 1st of each year for the twelve months next preceding.

And the Lessors covenant with the Lessee, that it, the Lessee, shall and will pay all Government taxes on the lands hereby demised, and shall and will erect and maintain legal fences around the demised premises, such fences to be erected, maintained and kept in good repair and order at the expense of the Lessee, and in case

rights of way for Government roads through part 4 of the demised premises shall be opened during the term of this lease, the Lessee will claim no indemnity or reduction of rent from the Lessors by reason thereof; and further, in the event of the Hawaiian Government, at any time during this lease, desiring to secure for a public cemetery that certain portion of the demised premises in the said Ahupuaa of Halawa lying below the public road adjoining Aiea, and containing an area of 43.2 acres, as per map of the Government Survey Department, 1909, the Lessee will, within a proper time after the harvesting of the crops growing thereon, give up the same without reduction of rent or other charge; provided, however, that the land so given up by the Lessee shall be taken away from the Lessee for the purpose now contemplated, to wit, the making of a public cemetery; and shall and will, at all proper and necessary times and dates, pay the rent hereinabove reserved under and according to the terms thereof; and at the end of said term or other sooner determination thereof will peaceably deliver up to the Lessors possession of the demised premises, together with all the improvements upon or belonging to the same.

PROVIDED, HOWEVER, if the Lessee, its successors or assigns, shall fail to pay the said rent, or any part thereof, as aforesaid, whether the same shall or shall not have been legally demanded, or shall become bankrupt, or shall abandon the said premises, the said Lessors may at once re-enter the demised premises and may terminate this lease without service of notice, or legal process, and without prejudice to any other remedy or right of action for arrears of rent, or for any proceeding or other breach of contract.

And it is hereby expressly agreed and declared that the acceptance of rent by the Lessors shall not be deemed to be a waiver by them of any breach by the Lessee of any covenant herein contained, and that the term "lessors" in these presents shall include the Lessors, their heirs, successors and assigns, and also that the term "lessee" shall include the Lessee, its successors and assigns.

And, further, that, whereas, the premises hereby demised for terms to begin in 1906 and 1908, as aforesaid, are now under lease by said Trustees to one L. L. McCandless and to James I. Dowsett; and whereas the Lessee herein has arranged with them, the said Dowsett and McCandless for the possession of the demised premises until the beginning of the term of this lease.

NOW, THEREFORE, the Lessors expressly agree that, if either the said Dowsett or McCandless, or their heirs, representatives or assigns, shall fail to comply with the terms of the respective leases under which they claim at any time during the existence of the same, that the Lessee, its successors or assigns, shall be allowed to take over said leases or to lease anew from the Lessors upon the same terms as are set forth in said leases to McCandless and Dowsett.

IN WITNESS WHEREOF, the Lessors and Lessee have to this and to another instrument of like date and

tenor set their hands and seals the day and year first above written.

S. M. DAMON,
CHARLES M. HYDE,
J. O. CARTER,
Trustees Under the Will of Bernice P. Bishop.

HONOLULU SUGAR CO. [Seal]
By N. OHLANDT,
President.
And by E. H. SHELDON,
Secretary.

State of California,
City and County of San Francisco. } ss.

On this nineteenth day of October, in the year A. D. one thousand eight hundred and ninety-eight, personally appeared before me, Nicholas Ohlandt, known to me to be the President, and E. H. Sheldon, known to me to be the Secretary of the Honolulu Sugar Company, the corporation described in, and which executed the foregoing instrument, and acknowledged to me that such corporation executed the same freely and voluntarily, and for the uses and purposes therein set forth.

[Seal] AUGUSTA W. DUISENBERG,
Notary Public in and for the City and County of San Francisco, State of California.

[Ten Cents U. S. Int. Rev. Stamps. Canceled.]

HAWAIIAN CONSULATE,
San Francisco, Cal., U. S. A.

I hereby certify, that Augusta W. Duisenberg, whose name is affixed to the annexed certificate, was at the

time of signing the same, a regular commissioned and duly qualified Notary Public for the City and County of San Francisco, State of California, U. S. A., and that her acts as such are entitled to full faith and credit.

In testimony whereof, I have hereunto set my hand and affixed my official seal this 20th day of October, A. D. 1898.

[Seal] CHAS. T. WILDER,
Hawaiian Consul-General.

Hawaiian Islands, } ss.
Island of Oahu. }

On this seventh day of November, A. D. 1898, personally appeared before me S. M. Damon, Charles M. Hyde and J. O. Carter, three of the Trustees under the will of Bernice P. Bishop, all known to me to be the persons described in, and who executed, the foregoing instrument, who severally acknowledged to me that they executed the same freely and voluntarily, and for the uses and purposes therein set forth, as such Trustees.

[Seal] N. FERNANDEZ,
Notary Public, First Judicial Circuit.

[Endorsed]: Lease. No. 4. Bishop Est. W. F. Allen et al. Trustees, etc., to Honolulu Sugar Company. Indexed. Dated October 1st, 1898. Register office, Oahu—ss. Received for record this 8th day of November, A. D. 1898, at 10:37 o'clock A. M., and recorded in Liber No. 185 on pages Nos. 102-107, and compared. Thos. G. Thrum, Registrar of Conveyances. By ————, Deputy Registrar. S. Z. R. S. M. Recording fees, $14.

U. S. Dist. Court. U. S. vs. Bishop et al. (Hono. P. Co.) Pltff.'s Ex. "E." W. B. Maling, Clerk.

U. S. Dist. Court. U. S. vs. Hon. Co. Plaintiff's Ex. No. 12. F. L. Hatch, Dep. Clerk.

No. 896. United States Circuit Court of Appeals for the Ninth Circuit. Plaintiff's Exhibit No. 12. Received Sept. 29, 1902. F. D. Monckton, Clerk. By Meredith Sawyer, Deputy Clerk.

Plaintiff's Exhibit No. 13.

ANNUAL EXHIBIT OF CORPORATIONS.

Exhibit of the Honolulu Plantation Co. for the year ending January 1, 1901.

Date of Charter: May 18th, 1899.

Term of Charter: 50 years.

Original Shares of Stock: 100,000, at $50.00, $5,000,000.

Increased ——— 1—— to ——— Shares.

Increased ——— 1—— to ——— Shares.

Increased ——— 1—— to ——— Shares.

No. of Shares issued, sold or transferred during the year ending Jan. 1, 1901: 19,677.

Par value Shares issued, sold or transferred during year ending Jan. 1, 1901: $983,850.00.

Present Number of Shares, 100,000, at $50.00: $5,000,000.

Capital, $———, Paid up Capital, ———: $———.

Amount paid as Dividends for year ending Jan. 1, 1901, per cent: None.

Amount of Gross Sales or Income for the year ending Jan. 1, 1901: None.

Amount of Actual Running Expenses for the year ending Jan. 1, 1901: All new work.

Number of Tons Produced, if a Sugar or Rice Plantation, for the year ending Jan. 1, 1901: None.

ASSETS OF CORPORATION—Jan. 1, 1901.

Real Estate (give location and description).	
Lands in fee and sundry leasehold interests..	$100,000.00
Personal Property (give particulars in detail).	
Cost of Mill, Railroad and Cars, Reservoirs, Waterways, Flumes and Trestles, Growing Crops, Mdse., Tools and Implements, etc., etc., etc.....	$2,264,299.92
Bonds (describe them).	
Mortgages (on what property and for what amount)	———
Notes	———
Book Accounts	———
Cash in Hand	$ 1,926.68
Total	$2,366,226.60

LIABILITIES OF CORPORATION—Jan. 1, 1901.

Here give an account of all liabilities, both secured and unsecured.

Due Wm. G. Irwin & Co.....	$793,495.13
Due Crocker-Woolworth Bank.....	50,000.00
	$843,495.13

RETURNS TO THE TAX ASSESSOR, 1901.

Real Estate	$———
Personal Property	$———
Total	$———

OFFICERS OF THE CORPORATION—Jan. 1, 1901.

Elected Nov. 19, 1900.

John A. Buck, President.

N. Ohlandt, Vice-President.

Samuel Sussman, Treasurer.

E. H. Sheldon, Secretary.

————, Auditor,

Name of person on whom service of legal process may be made, and location of his office: Wm. G. Irwin & Co., Honolulu.

Location of the Office of the Corporation: 327 Market St., San Francisco.

STOCKHOLDERS HONOLULU PLANTATION COMPANY, Jan. 1, 1901.

Ayden, Thos., San Francisco.....	50 Shares
Ayden, Thos. Jr., San Francisco.....	15 Shares
Alfs, William, San Francisco.....	100 Shares
Buck, John A., San Francisco.....	145 Shares
Burns, Isidore, San Francisco.....	60 Shares
Bernhardt, Chas., San Francisco.....	22 Shares
Brown, Joe. A., San Francisco.....	5 Shares
Broderick, W. F., San Francisco.....	10 Shares
Belshaw, C. M., San Francisco.....	200 Shares
Corder, T. W., San Francisco.....	591 Shares
Chase, Elizabeth, San Francisco.....	40 Shares
Coggins, Leslie I., San Francisco.....	20 Shares
Child & Barker, San Francisco.....	40 Shares
Corder, Amy A., San Francisco.....	50 Shares
Dean, Peter, San Francisco.....	400 Shares
Denicke, E. A., San Francisco.....	50 Shares
Durbrow, Elb, Tr., San Francisco.....	500 Shares

Day, James A., San Francisco	10 Shares
Davis, W. S., Tr., San Francisco	211 Shares
Dorward, D. or J., San Francisco	100 Shares
Daingerfield, Wm. R., San Francisco	100 Shares
Duperu & Co., San Francisco	150 Shares
Ehrman, M., San Francisco	952 Shares
Frowenfeld, J., San Francisco	111 Shares
Falsch, Otto, San Francisco	30 Shares
Foerster, Agnes, San Francisco	100 Shares
Frueler, J., Tr., San Francisco	500 Shares
Green, C. E., San Francisco	406 Shares
Holje, M., San Francisco	200 Shares
Hoelscher, Wm., San Francisco	100 Shares
Hinkel, John, San Francisco	200 Shares
Hinkel, Geo. H., San Francisco	100 Shares
Haas, Wm., San Francisco	50 Shares
Hufschmidt, F., San Francisco	50 Shares
Hollings, N., San Francisco	35 Shares
Howard, H. P., San Francisco	50 Shares
Koster, John L., San Francisco	509 Shares
Knust, Henry, San Francisco	200 Shares
Lehmann, Ch., San Francisco	215 Shares
Martin, Jos., San Francisco	55 Shares
Matson, Wm., San Francisco	259 Shares
Moore, R. S., San Francisco	400 Shares
Morrison, A. F., San Francisco	141 Shares
Mirk, Thos., San Francisco	50 Shares
Meertief, Abe., San Francisco	100 Shares
McElroy, R. D., San Francisco	75 Shares
Mills, W. H., San Francisco	200 Shares
Metson, W. H., San Francisco	400 Shares
Naber, Alfs & Brune, San Francisco	200 Shares

Newman, Juda, San Francisco	150 Shares
Newman, Simon, San Francisco	100 Shares
Ohlandt, N., San Francisco	145 Shares
Pockwitz, Louis, San Francisco	150 Shares
Page, G. L., San Francisco	30 Shares
Peterson, N. P., San Francisco	20 Shares
Roth & Co., San Francisco	150 Shares
Sussman, Samuel, San Francisco	105 Shares
Schnutenhaus, E. & M., San Francisco	30 Shares
Schwab, F. L., San Francisco	10 Shares
Southard, A. B., San Francisco	30 Shares
Honolulu Sugar Co., San Francisco	81000 Shares
Ohlandt, Henry, San Francisco	500 Shares
Ortion, Emile, San Francisco	20 Shares
Ohlandt & Buck, San Francisco	358 Shares
Sewall, H. M., Bath, Maine	1100 Shares
Schumacher, J. H., San Francisco	10 Shares
Spreckels, A. B., San Francisco	700 Shares
Spreckels, John D., San Francisco	700 Shares
Smith, Peter A., San Francisco	85 Shares
Smith, Edwin L., San Francisco	15 Shares
Stern, J., San Francisco	100 Shares
Smith, George, San Francisco	50 Shares
Scheeline, Sol. E., San Francisco	300 Shares
Simpson, J. A., San Francisco	100 Shares
Sorenson, C. M., San Francisco	10 Shares
Tillman, F., Jr., San Francisco	605 Shares
Troy, E. P. E., San Francisco	11 Shares
Warner, B. M., San Francisco	20 Shares
Wertz, Kalé M., San Francisco	60 Shares
Wenzel, Edward, San Francisco	25 Shares
Wertsch, Wm., San Francisco	30 Shares

Wertsch, Louisa, San Francisco.....	10 Shares
Wobber, B. W., San Francisco.....	200 Shares
Wobber, Hugo, San Francisco.....	15 Shares
Wagner, Jos., San Francisco.....	100 Shares
Williams, Dimond & Co., San Francisco....	200 Shares
Wilson, A. W., San Francisco.....	100 Shares
Sheldon, E. H., Trustee, San Francisco....	805 Shares
Cartwright, Bruce, Honolulu, H. T.....	200 Shares
Cornwell, W. H., Honolulu, H. T.....	50 Shares
Center, D., Honolulu, H. T.....	50 Shares
Giffard, W. M., Honolulu, H. T.....	28 Shares
Graham, Wm. M., Honolulu, H. T.....	100 Shares
Hoogs, W. H., Honolulu, H. T.....	100 Shares
Hoogs, W. H., Tr., Honolulu, H. T.....	50 Shares
Holmes. M. V., Honolulu, H. T.....	50 Shares
Irwin, Wm. G., Honolulu, H. T.....	1500 Shares
James, Mrs. Lilian, Honolulu, H. T.....	100 Shares
Low, James A., Honolulu, H. T.....	256 Shares
Lowe, D. W., Honolulu, H. T.....	75 Shares
McKeague, R. A., Honolulu, H. T.....	100 Shares
Mansbridge, R., Honolulu, H. T.....	50 Shares
Morgan, James, Honolulu, H. T.....	100 Shares
More, Jane, Honolulu, H. T.....	10 Shares
Ross, George, Honolulu, H. T.....	250 Shares
Ross, John M., Honolulu, H. T.....	30 Shares
Spalding, E. J., Honolulu, H. T.....	10 Shares
Von Hoht, H. M., Honolulu, H. M.....	10 Shares
Wundenberg, F., Honolulu, H. T.....	50 Shares
Walker, T. B., Honolulu, H. T.....	50 Shares
Ohlandt, N., Trustee, Honolulu, H. T.....	75 Shares
	100,000 Shares

I, E. H. Sheldon, Secretary, do solemnly swear that the foregoing is a true and correct statement from the books of the Honolulu Plantation Co. as of the 1st day of January, A. D. 1901.

[Corporation Seal] E. H. SHELDON.

Subscribed and sworn to before me this twenty-ninth day of January, 1901.

[Seal] AUGUSTA W. DUISENBERG,
Notary Public in and for the City and County of San Francisco, State of California.

Note.—Should any of the spaces in this blank be insufficient for the insertion of the information required, additional sheets may be attached for the purpose.

I do hereby certify that the foregoing documents to be a true and correct copy of the annual corporation exhibit of the "Honolulu Plantation Co." for the year ending December 31, 1900, on file in the treasurer's office.

[Seal] HENRY C. HAPAI,
Registrar Public Accounts.
Treasurer's Office, Territory of Hawaii, March 4th, 1902.

[Endorsed]: 1900. Corporation Exhibit Honolulu Plantation Co. January 1, 1901.

U. S. Dist. Court. U. S. vs. Hon. Plan. Co. Plaintiff's Ex. No. 13. F. L. Hatch, Dep. Clerk.

No. 896. United States Circuit Court of Appeals for the Ninth Circuit. Plaintiff's Exhibit No. 13. Received Sept. 29, 1902. F. D. Monckton, Clerk. By Meredith Sawyer, Deputy Clerk.

Plaintiff's Exhibit No. 14.

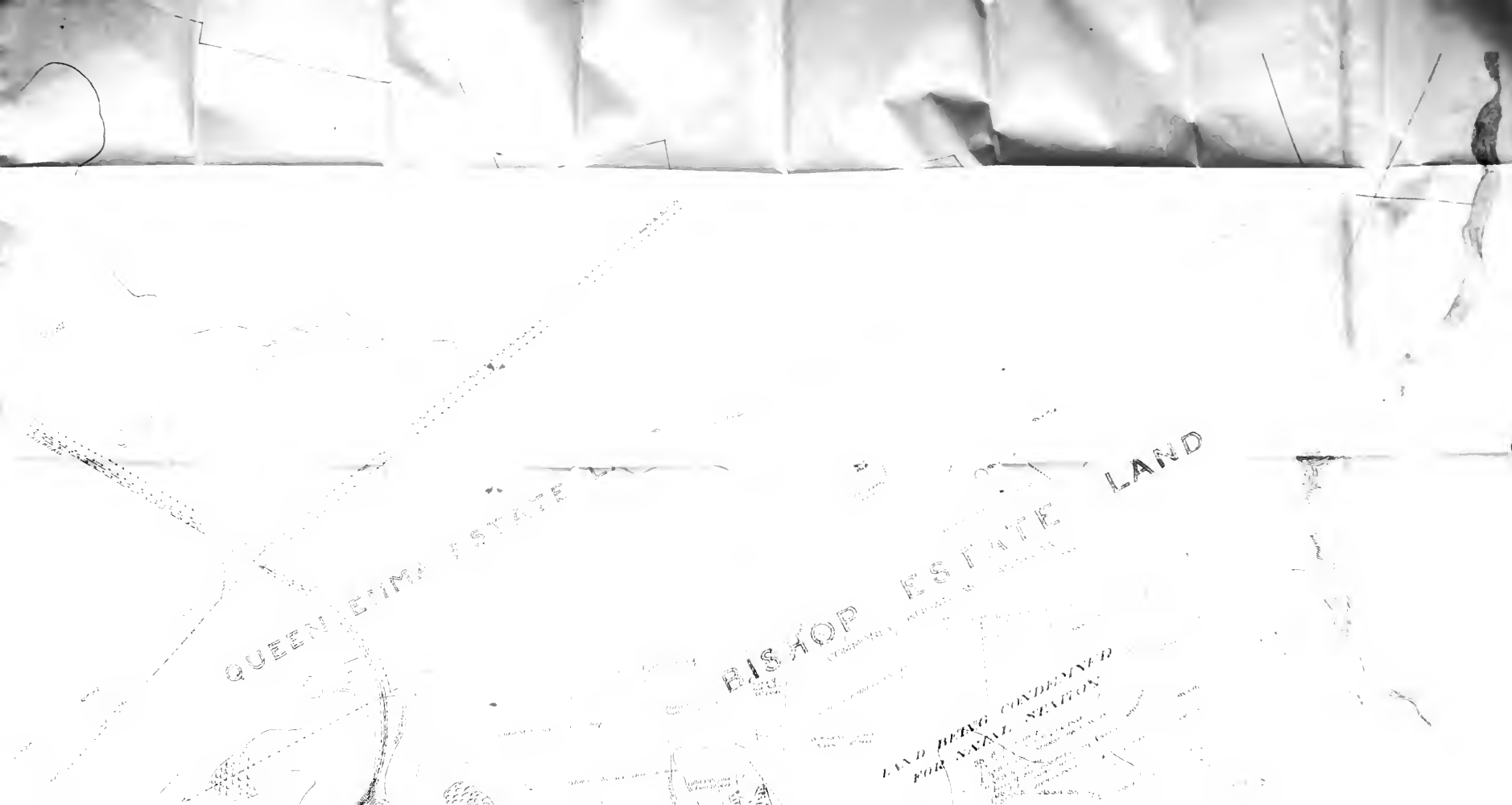
Total area Makai	469 acres
Total area Mauka	149 acres
Total area Island	39 acres
All told	657 acres
Out of this cane land	342 acres
Leaving,	315 acres

For land on Island and land which cannot be cultivated.

Land all lays below 25 ft. contour.

[Endorsed]: U. S. Dist. Court. Hawaii. U. S. vs. Hono. P. Co. Pltff's. Ex. "I." W. B. Maling, Clerk. Plaintiff's Ex. No. 14. F. L. Hatch, Dep. Clerk.

No. 896. United States Circuit Court of Appeals for the Ninth Circuit. Plaintiff's Exhibit No. 14. Received Sept. 29, 1902. F. D. Monckton, Clerk. By Meredith Sawyer, Deputy Clerk.


QUEEN EMMA ESTATE
BISHOP ESTATE
LAND
LAND BEING CONDEMNED
FOR NAVAL STATION

MAP SHOWING
PROPERTY OF THE HONOLULU PLANTATION CO.
AND ADJOINING LAND, AT PUULOA.

No. 896

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

THE UNITED STATES OF AMERICA,
PLAINTIFF IN ERROR,

vs.

ESTATE OF BERNICE PAUAHI BISHOP, Deceased, et Al.,
DEFENDANTS IN ERROR.

HONOLULU PLANTATION COMPANY CASE.

Brief for Plaintiff in Error.

J. J. DUNNE,
Ass't U. S. Attorney, Dist. of Hawaii,
Counsel for Plaintiff in Error.

THE STAR PRESS—JAMES H. BARRY

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

THE UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

ESTATE OF BERNICE PAUAHI BISHOP,
DECEASED, ET AL.,
Defendants in Error.

HONOLULU PLANTATION COMPANY CASE.

BRIEF FOR PLAINTIFF IN ERROR.

This was a proceeding in eminent domain. Pursuant to instructions from the Attorney General of the United States and from the Secretary of the Navy, proceedings were instituted in the United States District Court for the District of Hawaii to condemn, to the uses and purposes of the national Government, certain lands situate on the shores of Pearl Harbor, in the Island of Oahu, in the District of Hawaii. These lands were intended to serve the purpose of a naval station. Very many persons and corporations were interested in the property, directly and indirectly, and, among others, the Honolulu Planta-

tion Company, the present defendant in error. The issues joined between the Honolulu Plantation Company and the Government were tried before a jury. The verdict was unsatisfactory to the Government; whence this writ of error.

GENERAL STATEMENT OF THE CASE.

This proceeding was intended to condemn for the use of the Government, 561.2 acres of land out of about 8,000 acres of the defendant's estate (Record, pp. 246, 253, 625-6). When the pleadings were originally made up, the cause was tried before a jury, and a verdict rendered. Upon motion for a new trial, this verdict was set aside by the Court, for the reasons stated in the opinion, which forms a part of the motion for a new trial printed in the Record, pp. 41, 508. The cause was again set down for trial, and this second trial commenced on March 3, 1902; and it is against the results of this second trial that the Government now protests.

The cause involved no question concerning the fee in the land; that matter was disposed of upon the trial of the Bishop case, the Estate of Bernice Pauahi Bishop, deceased, the owner of the fee, being one of the parties to the record. All that this second trial was concerned with was the market value of a leasehold interest only, and of a leasehold of 561.2 acres out of 8,000—just about 1-14th. The leasehold interest involved two leases: The first, a paid-up lease, expiring in 1908; and the second not beginning to run until 1908—6 years off. Nor was

this second trial concerned with either detriment or benefit to adjacent lands. No question of that character was involved; no evidence of that character was presented. There was no question made concerning areas. The Government was not seeking the entire estate of the defendant, but only a very insignificant fraction. The manager of the plantation, Mr. Low, fixed the area of the plantation at 8,000 acres; the stipulated area involved in the trial amounted to 561.2 acres, of which only 342 acres were of any value (Record, pp. 297-8, 299, 643); but taking an outside estimate, only about 1-14th of the plantation was involved, the other 13-14ths remaining untouched and undisturbed.

The trial exhibited the antecedent history of this land. It showed the land to have been an uncultivated waste—a range for cattle and goats (Record, Low, 271, 631; Thurston, 375; Ahrens, 356-7, 671). The trial exhibited the physical characteristics of the land, also. The evidence did not set this land upon a pedestal; it was not shown to stand apart, or to be specially preeminent, or to fill the world with wonder at its extraordinary physical perfections. The evidence showed that the shore line of this property was as crooked and misshapen as the body of Richard (Record, White, 107, 543-4). It showed outlying reefs conspicuous all along the sinuous shore, depriving that shore of its adaptability for the reception of ships, and necessitating expensive blasting and dredging (Record, White, 104-8, 124-6, 549-550). It also showed that much of the land itself was waste land; that there were

many marshy places throughout it (Record, Morgan, 369); that between five per cent and ten per cent was marsh (Record, White, 108, 544); and that at least forty per cent of it was rocky (Record, White, 110-111, 545; Low, 295, 641).

The evidence further showed that this land was not homogeneous; that it varied in agricultural availability (Low's yellow slip, Exhibit 14, Record, p. 640-1); that it varies in productiveness (idem); and that it varied in depth of soil (Record, White, 110, 545; Low, 641; Morgan, 369). The water supply was deficient. There was no natural water supply (Record, White, 111, 545); there was only one small, brackish artesian well (Record, Low, 296-7, 642; White, 111, 545-6; Archer, 182). This well was constructed in 1883, long before this defendant in error was even thought of (Record, L. L. McCandless, 193, 594; J. A. McCandless, 227, 619-620); and no proof was made of the market or other value of its user. The evidence showed, also, an absence of permanent improvements (Record, White, 104, 108, 111-2, 541-2, 544, 546; Low, 296-7, 302, 642, 645); and it also showed that nearly one-half of the tract was useless; that, to adopt Low's language, nearly one-half "cannot be cultivated" (Low's yellow slip, Exhibit 14, Record, p. 640-641).

The evidence also exhibited the commercial characteristics of the land. It showed that, until recently, the land was merely a barren waste overrun by cattle, and never had an annual use or yearly value (Record, Archer, 159-160, 583; McCandless, 238-240, 622-3; Low, 300; Thur-

ston, 375; Ahrens, 356-7, 671). It showed that the land has never been cleared or plowed as a whole (Low's yellow slip, Exhibit 14, Record, p. 640-641). It showed that this tract had never been either sowed or cropped (Record, White, 111-2, 546; Archer, 159-160, 583; Low, 296, 641-2; Bolte, 270, 630); and it further showed that this tract had never been devoted to any useful purpose, and had never produced a single dollar of income (Record, Low, 300).

Two theories of value permeated the case. They were formulated in the pleadings, and they recurred constantly throughout the evidence. The theory of the Government was that this tract of land was of very moderate value, indeed: the theory of the defendant was that this tract of land was of most unusual value; and evidence was offered by both sides in line with these two theories. The average valuation of the Government for the leasehold interest proper was $15,428; the average valuation of the Government for the improvements, if any, was $5,890; thus making an average aggregate estimate, on the part of the Government, of $21,318. The average valuation of the defendant for the leasehold proper was $217,419.00; the average valuation of the defendant for the improvements, if any, was $12,500.00; thus making an average aggregate estimate, on the part of the defendant, of $229,919.00. The verdict in the case, however, was not responsive to either of these theories, or to either of these lines of evidence; it placed the valuation of the leasehold proper at $94,000; it placed the valuation of the

improvements, if any, at $8,523.00; thus making an aggregate valuation or estimate, widely differing from the estimate of either of the contending parties, of $102,523.00 In this condition of things, it was only natural that the Government should be dissatisfied.

SPECIFICATION OF ERRORS.

1.

Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked on cross-examination from the witness U. S. G. White: "Now do you know whether there is a mill belonging to "the plantation a mile above this land?" Bill of Exceptions, Exception No. 2.

And in this behalf, this specification of errors now quotes the full substance of the evidence so admitted:

"Q. Now, do you know whether there is a mill "belonging to the plantation a mile above this land?

MR. DUNNE: I object to that as not proper "cross-examination, and upon the ground that it is "going into some other land, other than this land, "outside of this land, which we do not know anything about. The witness testified that there was "no mill on this land on July 6th, 1901, and he was "not asked as to any other land--purely the land in "controversy on July 6th, 1901.

" THE COURT.—It is not cross-examination, but

" the Court will allow the witness to answer the ques-
" tion; the objection is overruled.

" Mr. DUNNE.—We except.

"EXCEPTION No. 2.—And said plaintiff and
" petitioner now assigns said ruling as error."

" THE WITNESS.—A. I know of the Hono-
" lulu Plantation mill."

Assignment of Error No. 1.

2.

Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked on cross-examination from the witness U. S. G. White: " And " that it stands now where it stood on the 6th of July, " 1901?" Bill of Exceptions, Exception No. 3.

And in this behalf, this Specification of Errors now quote the full substance of the evidence so admitted:

" Q. And that it stands now where it stood on the
" 6th of July, 1901?"

" Mr. DUNNE.—I object to that; we are not try-
" ing to condemn any of this land, and I object to the
" introduction on cross-examination of this matter,
" He testified that there was no mill on this land,
" the land involved in this case, as it stood on July
" 6th, 1901; he said nothing about any other land.
" This is objected to as irrelevant and immaterial, and
" not cross-examination or pertinent to any matter

" testified to by the witness on the direct examina-
" tion.

" THE COURT.—Now you can answer yes or no,
" and then explain just as you like, that is, if you
" want to without regard to either counsel.

" Mr. DUNNE.—We except.

"(EXCEPTION No. 3. And said plaintiff and
" petitioner now assigns said ruling as error.)

" THE WITNESS.—A. Yes, sir."

Assignment of Error No. 2.

3.

Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked on cross-examination from the witness U. S. G. White: "What was the size, Captain, of that mill?" Bill of Exceptions, Exception No. 4.

And in this behalf, this Specification of Errors now quotes the full substance of the evidence so admitted:

" Q. What was the size, Captain, of that mill?"

" Mr. DUNNE.—That is objected to as imma-
" terial, irrelevant and not cross-examination. I
" asked nothing about that mill; it is lugging in here
" entirely new matter to which no reference was
" made on the direct examination; it is seeking in the
" midst of a cross-examination to prove their case.

" THE COURT.—Let him answer.

" Mr. DUNNE.—We except.

"(EXCEPTION No. 4. And said plaintiff and pe-
" titioner now assigns said ruling as error.)
" THE WITNESS.—A. It is a large mill."

Assignment of Error No. 3.

4.

Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked on cross-examination from the witness U. S. G. White: " How far is this Halawa Valley that you have testified " about in your first answer that I asked in regard to it " from the land in question—the nearest portion to the " land in question?" Bill of Exceptions, Exception No. 5.

And in this behalf, this Specification of Errors now quotes the full substance of the evidence so admitted:

Assignment of Error No. 4.

" Q. How far is this Halawa Valley that you have
" testified about in your first answer that I asked in
" regard to it from the land in question—the nearest
" portion to the land in question?
" Mr. DUNNE.—I object to that on the ground
" that it is wholly immaterial, and not proper cross-
" examination, and not addressed to any subject mat-
" ter to which the witness' attention was called on the
" examination in chief; and upon the additional
" ground that he might as well be asked how far
" Paris is from this piece of land.

" THE COURT.—That might be, but the Court " will allow him to answer how far Halawa Valley " is from this land.

" Mr. DUNNE.—We except.

"(EXCEPTION No. 5. And said plaintiff and " petitioner now assigns said ruling as error.)

" THE WITNESS.—A. I should say about a " mile and one-half, or a mile and a quarter—that is, " by the road. I do not know, only approximately, " over how much country down there adjoining this " land the Honolulu Plantation Company's property " extends—approximately, I should say that it ex- " tends over 5,000 or 6,000 acres, and includes the " land surrounding this land. I think Halawa Val- " ley is included in the Honolulu Plantation prop- " erty. I pass through it."

5.

Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked on cross-examination from the witness J. W. Pratt: " Now, " Mr. Pratt, how is this return made up; what kind of a " return is this under the law?" Bill of Exceptions, Exception No. 6.

And in this behalf, this Specification of Errors now quotes the full substance of the evidence so admitted:

" Q. Now, Mr. Pratt, how is this return made up; " what kind of a return is this under the law?

" Mr. DUNNE.—I object to that on the ground " that it is a double question.

" Mr. SILLIMAN.—I will divide it.

" THE COURT.—Let us hear what Mr. Pratt " says.

" Mr. DUNNE.—We except.

" (EXCEPTION No. 6. And said plaintiff and " petitioner now assigns said ruling as error.)

" THE WITNESS.—It is made under the head, " aggregate value of plantations. It is under that " head—a business for profit."

Assignment of Error No. 5.

6.

Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked on cross-examination from the witness F. K. Archer: " Now, Mr. " Archer, do you know what that land is capable of yielding in sugar?" Bill of Exceptions, Exception No. 7.

And in this behalf, this Specification of Errors now quoted the full substance of the evidence so admitted:

" Q. Now, Mr. Archer, do you know what that " land is capable of yielding in sugar?

" Mr. DUNNE.—I object to that upon the ground " that it is not proper cross-examination, it ap- " pearing that no crop has ever been raised there.

" THE COURT.—Answer the question, the objec- " tion is overruled.

" Mr. DUNNE.—We except.

"(EXCEPTION No. 7. And said plaintiff and " petitioner now assigns said ruling as error.)

" THE WITNESS.—Where it is good land, it will " yield 9 or 10 tons per acre in cane; this land is good " for cane. I say two feet deep, dirt, where the dirt " is two feet deep, that is good land. A portion of " this land is waste and rocky—in fact, lava slabs. " I mean to say that land that could be plowed, some " land might be a foot deep, it could be planted with " cane all right to 18 or 20 or 24 inches deep is al- " right all good land. I have gone over the land. I " know the depth of soil upon it. Assuming that it " is 30 inches deep at the upper end and along the " dividing line between that taken by the Government " and Queen Emma's estate line on the other side, " and running from that down to nothing along the " sea shore—there is a strip along the sea shore that " is not arable; it ran from 30 inches at the Queen " Emma line and nothing at the sea shore line; I " think about 300 acres of that portion towards the " sea shore is arable, could be used, or what you " would call good land."

Assignment of Error No. 6.

7.

Said Court erred in denying to said plaintiff and petitioner an opportunity to state its objections to the following question asked on cross-examination from the wit-

ness F .K. Archer: "Do you know whether the Honolulu "Plantation Company had on the 6th of July, 1901, a "water supply that was immediately available to this "land in question?" Bill of Exceptions, Exception No. 8.

And in this behalf, this Specification of Errors now quotes the full substance of the aforesaid action of said Court:

"Mr. SILLIMAN.—Do you know whether the "Honolulu Plantation Company had on the 6th day "of July, 1901, a water supply that was immediately "available to this land in question?

"Mr. DUNNE.—I object to that question on the "ground ——

"THE COURT.—Ask the question.

"Mr. DUNNE.—We except.

"(EXCEPTION No. 8. And said plaintiff and "petitioner now assigns said ruling as error.)

"THE WITNESS.—Yes, sir."

Assignment of error No. 7.

8.

Said Court erred in overruling the objections of said plaintiff and petitioner to the following question asked on cross-examination from the witness F. K. Archer: "What was the extent of that water supply?" Bill of Exceptions, Exception No. 9.

And in this behalf, this Specification of Errors now quotes the full substance of the evidence so admitted:

"Mr. SILLIMAN.—What was the extent of that "water supply?

"Mr. DUNNE.—I make the same objection, that "we are getting outside of the land in controversy.

"THE COURT.—Ask the question.

"Mr. DUNNE.—We except.

"(EXCEPTION No. 9. And said plaintiff and "petitioner now assigns the said ruling as error.)

"THE WITNESS.—I don't know exactly how "much, how many gallons of water could be pumped "by those two pumps at Halawa. There is one big "pump; approximately, about 10,000,000 gallons "more or less, and the other pump 7 more or less, in "the other pump."

Assignment of Error No. 8.

9.

Said Court erred in denying the motion of plaintiff and petitioner to strike out the answer and testimony given by said witness F. K. Archer on cross-examination, in response to the question: "What was the extent of that "water supply?" Bill of Exceptions, Exception No. 10.

And in this behalf, this Specification of Errors now quotes the full substance of the evidence refused to be stricken out:

"THE WITNESS.—I don't know exactly how

" much, how many gallons of water could be pumped " by those two pumps at Halawa. There is one big " pump; approximately, about 10,000,000 gallons " more or less, and the other pump 7 more or less " on the other pump.

" Mr. DUNNE.—I move to strike out this testi- " mony upon the ground that it appears from his " answer that this alleged water supply, which is " not on the land, but so called 'immediately avail- " able'—whatever that means, springs from some- " where in the Halawa Valley; it goes out to the old " thing that your Honor has ruled out heretofore— " trying to fix the value of this land by something " else.

" THE COURT.—Immediately available to this " land, that is the question, and that is what the " Court ruled on; if it is immediately available to " this land, they can prove it.

" Mr. DUNNE.—We except.

"(EXCEPTION No. 10. And said plaintiff and " petitioner now assigns said ruling as error.)

" THE COURT.—I do not think it is cross-exam- " ination; no, I do not."

Assignment of Error No. 9.

10.

Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked on cross-examination from the witness F. K. Archer: " Do

" you know whether there is a flowing stream immediately " available for use upon this land within the lines of the " Honolulu Plantation Company?" Bill of Exceptions, Exception No. 11.

And in this behalf, this Specification of Errors now quotes the full substance of the evidence so admitted:

" Mr. SILLIMAN.—Q. Do you know whether " there is a flowing stream immediately available for " use upon this land within the lines of the Honolulu " Plantation Company?

" Mr. DUNNE.—I object to that upon the grounds " heretofore stated, and as going outside of the land " in controversy.

" THE COURT.—If it is immediately available to " this land, the witness can answer the question.

" Mr. DUNNE.—We except.

"(EXCEPTION No. 11. And said plaintiff and " petitioner now assigns said ruling as error.)

" THE WITNESS.—I do."

Assignment of Error No. 10.

11.

Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked on cross-examination from the witness F. K. Archer: "Well, " now, assuming that the land is in the same condition, " or substantially in the same condition on the 6th of " July, 1901, and considering its situation, and the uses

" it might be put to, and the improvements put upon it, " the plowing that has been done, the clearing that has " been done, all of its usefulness, the whole property of " the Honolulu Plantation Company that is available for " use, in connection with that land, assuming those things, " what do you say as to the value of the leasehold inter- " est?" Bill of Exceptions, Exception No. 12.

And in this behalf, this Specification of Errors now quotes the full substance of the evidence so admitted:

"Q. Well, now, assuming that the land is in the " same condition or substantially in the same condi- " tion on the 6th day of July, 1901, and considering " its situation, and the uses it might be put to, and " the improvements put upon it, the plowing that has " been done, the clearing that has been done, all of its " usefulness, the whole property of the Honolulu " Plantation Company that is available for use, in " connection with that land, assuming those things, " what do you say as to the value of the leasehold " interest?

" Mr. DUNNE.—I object to that question on the " ground that it is incompetent, an incompetent, hy- " pothetical question; it involves matters not estab- " lished by any evidence in this case.

" THE COURT.—Answer the question.

" Mr. DUNNE.—We except.

"(EXCEPTION No. 12. And said plaintiff and " petitioner now assigns said ruling as error.)

" A. I think about one hundred thousand dollars. " In estimating the value of the defendant's inter- " ests in this leasehold, I think I took into considera- " tion the value of the use of the buildings on the " land."

Assignment of Error No. 11.

12.

Said Court erred in overruling objections of plaintiff and petitioner to the following question asked on cross-examination from the witness F. W. Thrum: " Now, Mr. " Thrum, how do you know what this land will produce, " or whether it is good cane land or not?" Bill of Exceptions, Exception No. 13.

And in this behalf, this Specification of Errors now quotes the full substance of the evidence so admitted:

" Q. Now, Mr. Thrum, how do you know what " this land will produce, or whether it is good cane " land or not?

" Mr. DUNNE.—I object to that as wholly imma- " terial and purely speculative. I object to the ques- " tion upon the ground it is a double-headed ques- " tion. I have no objection to the latter part as to " how he knows that it is cane land. I object to the " first half, not the latter half.

" THE COURT.—Answer the question, the objec- " tion is overruled.

" Mr. DUNNE.—We except.

"(EXCEPTION No. 13. And said plaintiff and
" petitioner now assigns said ruling as error.)

" A. I have not testified that it was good cane
" land; it is not good cane land. I know the quality
" of this land from personal examination of it."

Assignment of Error No. 12.

13.

Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked on cross-examination from the witness F. W. Thrum: "Do " you know the yield of the Halawa Valley?" Bill of Exceptions, Exception No. 14.

And in this behalf, this Specification of Errors now quotes the full substance of the evidence so admitted:

" Q. Do you know the yield of the Halawa Valley?

" Mr. DUNNE.—I object to the yield of the
" Halawa Valley, on the ground that the yield of the
" Halawa Valley is wholly immaterial, and it not ap-
" pearing that this land ever had any yield.

" THE COURT.—The Court will give a pretty
" wide latitude in the examination of witnesses in re-
" lation to their qualifications to testify as to the
" values.

" Mr. DUNNE.—We except.

"(Exception No. 14. And said plaintiff and peti-
" tioner now assigns said ruling as error.)

" A. I do not."

Assignment of Error No. 13.

14.

Said Court erred in sustaining the objections of said defendant, said Honolulu Plantation Company, to the following question asked by said plaintiff and petitioner from the witness F. W. Thrum: "If a leasehold interest " for 40 years on that particular piece of land, 7 years " of which was fully paid up, the balance of which was " held at 3 1-2 per cent. of the sugar produced provided " it did not fall below $4000.00 per annum for the entire " tract of land including other lands, the first lease in- " cluding 2900 acres, and the second 2122 acres,— if such " a leasehold were offered for sale in the public market, " what would you be willing to pay per acre for it?" Bill of Exceptions, Exception No. 15.

And in this behalf, this Specification of Errors quotes the full substance of the evidence expected:

" A. Not over $20.00 per acre."

Assignment of Error No. 14.

15.

Said Court erred in granting the motion of said defendant, said Honolulu Plantation Company, to strike out from the testimony of the witness F. W. Thrum, the following passage: " I stated that part of my occupation " on the Ewa Plantation was the selection of cane land. " The first case was in 1895, when Mr. Lowrey was the

" manager, and many acres were valuable for the cultiva-
" tion of cane below field 19; that was then the extent of
" the plantation in that direction. I was sent out there,
" and started at field 19, and I cut lines through the al-
" geroba, the glue and the lantana, and was to report the
" land that I considered valuable for sugar cane, and
" after two or three weeks later I had got around this
" tract, field 19, and reported to him the number of acres
" that I considered valuable for sugar cane in that vicin-
" ity. My report was accepted." Bill of Exceptions, Exception No. 16.

And in this behalf, this Specification of Errors now quotes the full substance of the evidence so stricken out:

" THE WITNESS—(to Mr. Dunne)—I stated that
" part of my occupation on the Ewa Plantation was
" the selection of cane land. The first case was in
" 1895, when Mr. Lowrey was the manager, and
" many acres were valuable for the cultivation of
" cane below field 19; that was then the extent of the
" plantation in that direction. I was sent out there
" and started at field 19, and I cut lines through the
" algeroba, the glue and the lantana, and was to re-
" port the land that I considered valuable for sugar
" cane, and after two or three weeks later I had got
" around this tract, field 19, and reported to him the
" number of acres that I considered valuable for
" sugar cane in that vicinity. My report was ac-
" cepted.

" Mr. SILLIMAN.—I move to strike it out on the
" ground that it is not proper re-direct cross-examin-
" ation.

" THE COURT.—I do not think it is material;
" let it be stricken out.

" Mr. DUNNE.—We except.

"(EXCEPTION No. 16. And said plaintiff and
" petitioner now assigns said ruling as error.)"

Assignment of Error No. 15.

16.

Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked on cross-examination from the witness J. A. McCandless: " What is the value set on that leasehold interest of 142 "acres (referring to a certain tract of 142 acres on Ford " Island, originally sought to be condemned in this " action, but to which a discontinuance of the action was " subsequently made and filed by plaintiff and petitioner " and ordered by the Court)?" Bill of Exceptions, Exception No. 17.

And in this behalf this Specification of Errors now quotes the full substance of the evidence so admitted:

" Q. What is the value set on that leasehold in-
" terest of 142 acres?

" Mr. DUNNE.—I object to this; the records of
" this Court show that this entire matter was settled
" amicably between the Oahu Sugar Company and

" the Government; this is not proper cross-examina-
" tion; it is not directed to any matter testified to
" by the witness in chief; it is not proper cross-
" examination; it has no materiality here."

" THE COURT.—The Court will not rule out that
" testimony, but you can meet it, and you will have to
" meet it if it is met at all, because the Court will
" not rule out any testimony that has a tendency to
" explain any facts that are introduced before the
" jury.

" Mr. DUNNE.—We except.

"(EXCEPTION No. 17. And said plaintiff and
" petitioner now assigns said ruling as error.)

" THE WITNESS.—A. I see from that answer
" of the Oahu Sugar Company that they place a val-
" uation of $200,000 on 142 acres on Ford Island
" that I have been testifying about. I do not know
" what the chemical analysis of the sub-soil of Ford
" Island is; if you were to give me the chemical an-
" alysis of the sub-soil, I do not think I would be able
" to understand it—everything."

Assignment of Error No. 16.

17.

Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked on direct examination from the witness J. A. Low: "Just ex-
" plain the nature of your duties and the nature of your
" experience and the nature of your study on the subject

" (of the growth and manufacture of sugar)?" Bill of Exeptions, Exception No. 18.

And in this behalf, this Specification of Errors now quotes the full substance of the evidence so admitted:

" Q. Just explain the nature of your duties and " the nature of your experience, and the nature of " your study on the subject?

" Mr. DUNNE.—I object to that question on the " ground that it involves three separate and distinct " questions.

" THE COURT.—Let him answer them.

" Mr. DUNNE.—We except.

"(EXCEPTION No. 18. And said plaintiff and " petitioner now assigns the said ruling as error.)

" A. In connection with my duties as manager of " the plantation, was to direct the general work of " the plantation, employ men, plant cane, harvest it, " employ skilled men, men trained in the different " branches of the work, civil engineering, mechanical " engineering, cultivation, the agricultural portion of " the work, see to the animals, the driving, handling " of horses and mules, bookkeepers and accountants, " chemists, sugar boilers, electricians, and men adapt- " ed to locomotive engineering. The Honolulu Sugar " Company was organized in May, 1898, I think. It "was a corporation organized for the purposes of " cultivating and manufacturing sugar, selling the " sugar produced from the land, purchasing land,

" leasing land, running a mercantile business, and " running pieces of railroad and pipe-lines, etc. " These lands are situated in the Ewa and Kona Dis- " tricts, Island of Oahu. The plantation has about " 5000 acres situated around and adjoining this land. " I think that the total acreage rocky places and " waste land is about 8000 acres; I figured it up for " the last trial. There are 5000 acres of cane lands."

Assignment of Error No. 17.

18.

Said Court erred in overruling the objections of plaintiff and petitioner to following question asked on direct examination from the witness J. A. Low: " Why not " (that is to say, why was not sugar grown on this land " by the Honolulu Plantation Company)?" Bill of Exceptions, Exception No. 19.

And in this behalf, this Specification of Errors now quotes the full substance of the evidence so admitted:

" Q. Why not?

" Mr. DUNNE.—I object for the reasons why the " sugar was not grown on that land as being wholly " immaterial; it is the fact we deal with; not the " reasons that he may have for this fact.

" THE COURT.—Ask him the question.

" Mr. DUNNE.—We except.

"(EXCEPTION No. 19. And said plaintiff and " petitioner now assigns said ruling as error.)

"A. Because we are a new plantation and have "not been able to get there; all new plantations must "start from the mill and work out; and we have "done so."

Assignment of Error No. 18.

19.

Said Court erred in denying motion of plaintiff and petitioner to strike out the answer and testimony given by the witness C. Bolte on direct examination in response to the question: "Now considering the property sought to "be condemned in the state in which you saw it on the day "that you viewed it, that it was in substantially the same "state on the 6th of July, 1901, considering its situation "and the uses that might be made of it and to which it "was adapted, and assuming that the plantation has a "39 years' lease, seven years' rental of which has been "paid, and the remaining 32 years is upon a basis of "a crop-payment; that is, three and a half per cent of the "sugar produced, and the payment of the taxes, the lease "including other land, there was a minimum rent upon "the other land which is not material, and assuming that "there are 342 acres of cane land in the area sought to be "condemned, what in your opinion was the value of the "leasehold interest of that land on the 6th of July, 1901, "to the Honolulu Plantation Company?" Bill of Exceptions, Exception No. 20.

And in this behalf, this Specification of Errors now

quotes the full substance of the evidence so refused to be stricken out:

" A. $450,000."

Assignment of Error No. 19.

20.

Said Court erred in denying the motion of plaintiff and petitioner to strike out the testimony of said witness C. Bolte given on direct examination relative to the value of this leasehold to a particular individual—to the Honolulu Plantation Company.

Bill of Exceptions, Exception No. 21.

And in this behalf, this Specification of Errors now quotes the full substance of the evidence so refused to be stricken out:

" Q. Now considering the property sought to be " condemned in the state in which you saw it on the " day that you viewed it that it was in substantially " the same state on the 6th of July, 1901, considering " its situation and the uses that might be made of it, " and to which it is adapted, and assuming that the " plantation has a thirty-nine years' lease, seven " years' rental of which has been paid and the re- " maining thirty-two years is upon the basis of a " crop-payment, that is 3 1-2 per cent of the sugar " produced, and the payment of the taxes, the lease " including other land, there was a minimum rent " upon the other land which is not material, and as-

" suming there are 342 acres of cane land in the area
" sought to be condemned, what in your opinion was
" the value of the leasehold interests of that land on
" the 6th of July, 1901, to the Honolulu Plantation
" Company?

" A. $450,000.

" Mr. DUNNE.—I move to strike out the testi-
" mony of this witness as to value of this leaseohld
" to the Honolulu Plantation Company, on the
" ground that it is settled law that what this may be
" worth to the Honolulu Plantation Company is not
" a fair test of the market value.

" THE COURT.—The Court will not strike it out.

" Mr. DUNNE.—We except.

"(EXCEPTION No. 20. And said plaintiff and
" petitioner now assigns the said ruling as error.)

" Q. What was the market value?

" A. That is what I said. I have not made up my
" mind; I think it ought to be $250,000 or $300,000.

" THE COURT.—Q. Is there any difference be-
" tween the value and the market value?

" A. Yes, sir. The Honolulu Plantation, it might
" have a greater value to the Honolulu Plantation
" than than to anyone else; if it were put in the
" market, there would be three buyers of this land,
" the Ewa, the Oahu and the Honolulu; but it has a
" distinct value to the Honolulu Plantation.

" CROSS-EXAMINATION.

" Mr. DUNNE.—To save the rights of the Govern-
" ment, I move to strike out the testimony of the wit-
" ness relative to the value of this leasehold to a par-
" ticular individual—to the Honolulu Plantation
" Company—on the ground that the compensation is
" the market value, and not the value which the prop-
" erty may or may not have to a particular individual.

" THE COURT.—The Court will not strike it out.

" Mr. DUNNE.—We except.

" (EXCEPTION NO. 21. And said plaintiff and
" petitioner now assigns said ruling as error.)"

Assignment of Error No. 20.

21.

Said Court erred in denying the motion of plaintiff and petitioner to strike out the answer and testimony of the witness, J. A. Low, during his direct examination, when resumed, in response to the question, "What was the value "of the use of the buildings upon that land for the remain-"der of your term of the lease?" Bill of Exceptions, Exception No. 22.

And in this behalf, this Specification of Errors now quotes the full substance of the evidence so refused to be stricken out:

"The value of the use of the buildings upon that
"land for the remainder of our term of the lease was
"$13,500, I believe. The buildings are worth that to

"this company, because I do not believe there would "be a vestige of the buildings left at the termination "of the lease 40 years from now."

Assignment of Error No. 21.

22.

Said Court erred in denying motion of plaintiff and petitioner to strike out the testimony of the witness, J. A. Low, on direct examination, when resumed, relative to the nature and quality of the soil upon the land sought to be condemned to the Honolulu Plantation Company. Bill of Exceptions, Exception No. 23.

And in this behalf, this Specification of Errors now quotes the full substance of the evidence so refused to be stricken out:

"A. We have similar soil in the Halawa Valley "that we have raised cane on.

"Mr. DUNNE.—I object to this comparison to out- "side soil. He was asked concerning this soil.

"THE COURT.—He can go on if he will. Let us "hear it.

"Mr. DUNNE.—We except.

"(EXCEPTION NO. 23. And said plaintiff and "petitioner now assigns said ruling as error.)"

Assignment of Error 22.

23.

Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked on

direct examination from the witness, J. A. Low: "What "was its (the property sought to be condemned) value on "the 6th of July, 1901?" Bill of Exceptions, Exception No. 24.

And in this behalf, this Specification of Errors now quotes the full substance of the evidence so admitted:

"Mr. SILLIMAN.—Q. What was its value on the "6th of July, 1901?

"A. To the Honolulu Company?

"Q. Yes, sir.

"Mr. DUNNE.—The same objection; not a proper "test of market value.

"THE COURT.—The same ruling.

"Mr. DUNNE.—We except.

"(EXCEPTION NO. 24. And said plaintiff and "petitioner now assigns said ruling as error.)

"A. $400,000."

Assignment of Error No. 23.

24.

Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked by said Honolulu Plantation Company from the said witness, J. A. Low, during his direct examination, when resumed: "Mr. Low, that portion of the tax return read in evidence "here, showing the statement under the heading, 'Lease-" 'hold interest—return of real estate leases as per Sched-" 'ule B, $50,000—what have you to say in regard to it,

"Mr. Low, by way of explanation?" Bill of Exceptions, Exception No. 25.

And in this behalf, this Specification of Errors now quotes the full substance of the evidence so admitted:

"Q. Mr. Low, that portion of the tax return read "in evidence here, showing the statement under the "heading, 'Leasehold interest—return of real estate " 'leases as per Schedule B, $50,000'—what have you "to say in regard to it, Mr. Low, by way of explana- "tion?

"Mr. DUNNE.—I object to that. It is a mere am- "biguous question—a sort of question that would per- "mit almost any sort of an answer, hearsay or other- "wise.

"THE COURT.—Answer the question.

"Mr. DUNNE.—We except.

"(EXCEPTION NO. 25. And said plaintiff and "petitioner now assigns said ruling as error.)

"A. Fifty thousand dollars is a transcript of our "books, which show the cost of three rice plantations "that we purchased, the leasehold interest in the three "plantations which we purchased, an area of 113 "acres of cane land."

25.

Said Court erred in overruling the objection of plaintiff and petitioner to the following question asked by said Honolulu Plantation Company from the witness, W. R. Castle, on direct examination: "What knowledge have

"you of the development of the Plantations in that district "(meaning the district of Ewa)?" Bill of Exceptions, Exception No. 26.

And in this behalf, this Specification of Errors now quotes the full substance of the evidence so admitted:

"Q. What knowledge have you of the develop- "ment of the plantations in that district?

"Mr. DUNNE.—I object to that as entirely irrele- "vant and immaterial to any issue in this case—as to "the development of other plantations in that district.

"THE COURT.—Answer the question.

"Mr. DUNNE.—We except.

"(EXCEPTION NO. 26. And said plaintiff and "petitioner now assigns said ruling as error.)

"THE WITNESS.—I have been identified with the "plantations there—the Ewa plantation more partic- "ularly—and have known about the development of "all of these plantations, beginning with the Ewa "and coming around to the Honolulu plantation. I "have connection with some of the lands of the Hono- "lulu plantation, but not including this portion now "in controversy—lands that I had occasion to make "over to the Honolulu Plantation Company, not this "particular land; but I am talking about sales to the "Honolulu Plantation Company. I sold——

"Mr. DUNNE.—I object to any statement about "any sales that he may have made, or his connection "with any land except this land.

"THE WITNESS.—I am speaking about this "land.

"Mr. DUNNE.—I am addressing an objection to "the Court.

"THE COURT.—He can testify to any sales that "he made connected with this land.

"Mr. DUNNE.—He has testified already that he "had nothing to do with this land.

"THE WITNESS.—Recently, I said.

"Mr. SILLIMAN.—In times past. I am not ask- "ing for the amount of sales or anything.

"THE WITNESS.—I am still the administrator "of the estate and trustee of the Williams heirs. The "estate sold this land, this particular land, as well as "others; it was sold about 1880. The estate of Wil- "liams had a leasehold in common with Jim Castle, "and it covered this land as well as the other land, "and after some years I sold out the interest of the "estate of Williams to James I. Dowsett. I suppose "the conveyances are of record. I made the convey- "ance in shape and delivered it to Mr. Dowsett. It "covered the district of Halawa from the sea to the "mountains. My impression is that there were "about 3 or 4 thousand acres included in this land."

Assignment of Error No. 25.

26.

Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked by said

Honolulu Plantation Company from said witness, W. R. Castle, on direct examination: "Now, Mr. Castle, con- "sidering the property sought to be condemned, the state "which you saw it on the day that you viewed it, and as- "suming that it was in substantially the same state on "July 6, 1901, and taking into consideration the situation "of the land and all the uses that might be made of it, and "assuming that the plantation has a 39-years' lease, and "that 7 years' rental has been paid, and that the rental "for 32 years is on the basis of 3½ per cent of the sugar "produced, and the payment of taxes (the leases covering "other lands in addition to this), and for a minimum ren- "tal, and assuming that there are 342 acres of cane land "of the land sought to be condemned, what, in your opin- "ion, was the market value of the leasehold on the 6th of "July, 1901?" Bill of Exceptions, Exception No. 27.

And in this behalf, this Specification of Errors now quotes the full substance of the evidence so admitted:

> "Q. Now, Mr. Castle, considering the property "sought to be condemned, the state which you saw it "on the day that you viewed it, and assuming that it "was in substantially the same state on July 6th, "1901, and taking into consideration the situation of "the land and all the uses that might be made of it, "and assuming that the plantation has a 39-years' "lease, and that 7 years' rental has been paid, and "that the rental for 32 years is on the basis of 3½ "per cent of the sugar produced, and the payment of

"taxes (the lease covering other lands in addition to "this), and for a minimum rental, and assuming that "there are 342 acres of cane land of the land sought "to be condemned, what, in your opinion, was the "market value of that leasehold on the 6th of July "last?

"Mr. DUNNE.—I object to the question as imma- "terial, irrelevant and incompetent, not justified by "the evidence, and without foundation in this, that "there is no evidence here that this witness does "know what was the market value of such a leasehold "as described in the question, on July 6th, 1901.

"THE COURT.—Let him answer it.

"Mr. DUNNE.—We except.

"(EXCEPTION NO. 27. And said plaintiff and "petitioner now assigns said ruling as error.)

"THE WITNESS.—A. I should judge the value "to be about $250,000."

Assignment of Error No. 26.

27.

Said Court erred in overruling the objection of plaintiff and petitioner to the following question asked by said Honolulu Plantation Company from the witness, W. W. Goodale, on direct examination: "Now, Mr. Goodale, "considering this land sought to be condemned, in the "state in which you saw it on the day that you viewed it, "and assume that it is in substantially the same state or "was on the 6th of July last year, and considering the

"situation of it, and the uses that might be made of the "land and to which it was adapted, and assuming that "the plantation had a 39-years' lease, 7 years' rental of "which has been paid, the rental for 32 years is based "upon 3½ per cent of the sugar produced, the particular "lease covers other land as well as this, has a minimum "basis of rental and includes other land, and assume that "there is 342 acres of cane land, what, in your opinion, "is the market value of the leasehold to the Honolulu "Plantation Company of the land sought to be condemned "on the 6th of July last?" Bill of Exceptions, Exception No. 28.

And in this behalf, this Specification of Errors now quotes the full substance of the evidence so admitted:

> "Q. Now, Mr. Goodale, considering this land "sought to be condemned, in the state in which you "saw it on the day that you viewed it, and assume "that it is in substantially the same state or was on "the 6th of July last year, and considering the situa- "tion of it, and the uses that might be made of the "land and to which it was adapted, and assuming "that the plantation has a 39-years' lease, 7 years' "rental of which has been paid, the rental for 32 years "is based upon 3½ per cent of the sugar produced, "the particular lease covers other land as well as this, "has a minimum basis of rental and includes other "land, and assume that there is 342 acres of cane "land, what, in your opinion, is the market value of "the leasehold to the Honolulu Plantation Company

"of the land sought to be condemned on the 6th of "July last?"

"Mr. DUNNE.—Objected to as immaterial, irrel- "evant and incompetent; without foundation in this, "that it does not appear that the witness does know "the market value of such property on the 6th of "July, 1901.

"THE COURT.—The objection is overruled.

"Mr. DUNNE.—We except.

"(EXCEPTION NO. 28. And said plaintiff and "petitioner now assigns said ruling as error.)

"THE WITNESS.—A. Three hundred thousand "dollars."

Assignment of Error No. 27.

28.

Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked by said Honolulu Plantation Company from the witness, G. F. Renton, on direct examination: "Now, considering "this property sought to be condemned, in the state that "you saw it on that day that you visited it, and assuming "that it was in substantially the same situation on the "6th of July, 1901, and assuming that there is a lease for "39 years, 7 years of which has been paid up, and the "rental for 32 years is on the basis of 3½ per cent of the "sugar produced—the lease covers other land as well as "this—has a minimum rental, which, however, has no "materiality to the question, the payment of taxes, and

"considering all the uses and purposes to be made of the "land, and the situation in which it exists on that day, "and assuming, further, that there was 342 acres of cane "land within the area sought to be condemned, what, in "your opinion, was the market value of the leasehold in- "terest of the Honolulu Plantation Company on the 6th "day of July last year?" Bill of Exceptions, Exception No. 29.

And in this behalf, this Specification of Errors now quotes the full substance of the evidence so admitted:

> "Now, considering the property sought to be con- "demned, in the state that you saw it on that day "that you visited it, and assuming that it is in sub- "stantially the same situation on the 6th of July, "1901, and assuming that there is a lease for 39 "years, 7 years of which has been paid up, and the "rental for 32 years is on the basis of 3½ per cent "of the sugar produced—the lease covers other land "as well as this—has a minimum rental, which, how- "ever, has no materiality to the question—the pay- "ment of taxes, and considering all the uses and pur- "poses to be made of the land, and the situation in "which it exists on that day, and assuming, further, "that there was 342 acres of cane land within the area "sought to be condemned, what, in your opinion, was "the market value of the leasehold interest of the "Honolulu Plantation Company on the 6th day of "July last year?

"Mr. DUNNE.—Objected to as immaterial, irrele-
"vant and incompetent, and not an accurate and faith-
"ful statement of the evidence, and without founda-
"tion in this, that it does not appear that the witness
"knows what the market value of said leasehold was
"at the time mentioned.

"THE COURT.—The Court will overrule the ob-
"jection.

"Mr. DUNNE.—We except.

"(EXCEPTION NO. 29. And said plaintiff and
"petitioner now assigns said ruling as error.)

"THE WITNESS.—A. I should estimate it at
"$250,000 as the value of the land for the leasehold."
Assignment of Error No. 28.

29.

Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked by said Honolulu Plantation Company from the witness, F. Meyer, on direct examination: "Well, considering the "property sought to be condemned, as to its location and "all the uses that could be made of it, and assuming that "it is substantially in the same situation as it was on the "6th day of July, 1901, and assuming that there is a lease "of 39 years, 7 years of which are paid up, and 32 years "of which are on the basis of 3½ per cent of the sugar "produced, together with the payment of taxes, and also "saying that there is a minimum rental; that this 3½ per "cent should not be less than $4,000 a year; and assuming

"that there are 342 acres of cane land in the area sought "to be condemned, what, in your opinion, was the market "value of that leasehold interest on the 6th of July, "1901?" Bill of Exceptions, Exception No. 30.

And in this behalf, this Specification of Errors now quotes the full substance of the evidence so admitted:

"Q. Well, considering the property sought to be "condemned, as to its location and all the uses that "could be made of it, and assuming that it is substan- "tially in the same situation as it was on the 6th day "of July, 1901, and assuming that there is a lease "of 39 years, 7 years of which are paid up, and 32 "years of which are on the basis of 3½ per cent of "the sugar produced, together with the payment of "taxes, and also saying that there is a minimum ren- "tal; that this 3½ per cent should not be less than "$4,000 a year; and assuming, also, that there are 342 "acres of cane land in the area sought to be con- "demned, what, in your opinion, was the market "value of that leasehold interest on the 6th of July, "1901?

"Mr. DUNNE.—Objected to as incompetent, irrel- "evant and immaterial, and upon the ground that it "is not a fair and accurate statement, and is not a "competent hypothetical question; and without foun- "dation in this, that it does not appear that the wit- "ness knows the market value on the 6th of July, "1901.

"THE COURT.—Answer the question; objection "overruled.

"Mr. DUNNE.—We except.

"(EXCEPTION NO. 30. And said plaintiff and "petitioner now assigns said ruling as error.)

"THE WITNESS.—A. Three hundred thousand "dollars."

Assignment of Error No. 29.

30.

Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked by said Honolulu Plantation Company from the witness, A. Ahrens, on direct examination: "Now, considering the prop- "erty sought to be condemned, and the situation in which "you saw it on the day that you viewed—that is, in Octo- "ber; and assuming that it was in substantially the same "situation that it was on July 6th, 1901; and after taking "into consideration the use that might be made, the pur- "poses to which it is adapted; and assuming that there is "a 39-years' lease, 7 years of which are paid up, and the "balance of the ter mis upon the basis of 3½ per cent of "the crop; and I will also state for your information that "there is a minimum basis which includes other land— "now, assuming that there was 342 acres of cane land in- "cluded within the 561 acres, what, in your opinion, was "the market value of the leasehold interest on the 6th of "July last?" Bill of Exceptions, Exception No. 31.

And in this behalf, this Specification of Errors now quotes the full substance of the evidence so admitted:

"Q. Now, considering the property sought to be "condemned, and the situation in which you saw it "on the day that you viewed—that is, in October; "and assuming that it was in substantially the same "situation that it was on July 6th, 1901; and after "taking into consideration the use that might be "made, the purposes to which it is adapted; and as- "suming that there is a 39-years' lease, 7 years of "which are paid up, and the balance of the term is "upon the basis of a 3½ per cent of the crop, and I "will also state for your information that there is a "minimum basis which includes other land. Now, "assuming that there was 342 acres of cane land in- "cluded within the 561 acres, what in your opinion "was the market value of the leasehold interest on "the 6th of July last?

"Mr. DUNNE.—I object to the question as ir- "relevant and incompetent; and not a proper and "accurate statement of the testimony; and without "foundation, in that it does not appear that the wit- "ness knows what the market value of such a lease- "hold was on July 6th, 1901.

"THE COURT.—The Court will make the same "ruling and allow the testimony in.

"Mr. DUNNE.—We except.

"(EXCEPTION No. 31. And said plaintiff and pe-
"titioner now assigns said ruling as error.)
"THE WITNESS.—A. Two hundred and sev-
"enty-five thousand dollars."

Assignment of Error No. 30.

31

Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked by said Honolulu Plantation Company from the witness J. T. Crawley on direct examination: "What do you know "about the productive capacity of the soil of this land?" Bill of Exceptions. Exception No. 32.

And in this behalf, this Specification of Errors now quotes the full substance of the evidence so admitted:

"Q. What do you know about the productive ca-
"pacity of the soil of this land?
"Mr. DUNNE.—I object to the question as imma-
"terial, irrelevant and incompetent, and calling for
"a mere speculation, and without foundation upon
"which any reasonable person can base an opinion.
"THE COURT.—The objection is overruled.
"Mr. DUNNE.—We except.
"(EXCEPTION No. 32. And said plaintiff and
"petitioner now assigns said ruling as error.)
"THE WITNESS.—A. The soil is very well
"adapted to the growing of cane; it is good soil; the
"chemical composition of it is good and compares

"favorably with other soil in the vicinity that is rais-
"ing good crops of sugar."

Assignment of Error No. 31.

32.

Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked by said Honolulu Plantation Company from the witness J. F. Morgan on direct examination: "Now Mr. Morgan, tak-"ing into consideration the property sought to be con-"demned and its location and situation and what can be "done with the situation as you saw it on the day that you "viewed it, the uses and purposes that the land can be "put to; and assuming that the Honolulu Plantation Com-"pany has a 39 years' lease, 7 years of which were paid "up and the balance of the term is based upon 3½ per "cent of the sugar produced from the land, the lease also "covering other land, having a rental basis; and assuming "that there was 342 acres of cane land upon the land "sought to be condemned, what would you saw was the "market value of that leasehold interest on the 6th of July, "1901?" Bill of Exceptions. Exception No. 33

And in this behalf, this Specification of Errors now quotes the full substance of the evidence so admitted:

"Q. Now, Mr. Morgan, taking into consideration "the property sought to be condemned and its location "and situation and what can be done with the situa-"tion as you saw it on the day that you viewed it, the

"uses and purposes that the land can be put to; and "assuming that the Honolulu Plantation Company "has a 39 years' lease, 7 years of which were paid up "and the balance of the term is based upon 3½ per "cent of the sugar produced from the land, the lease "also covering other land, having a rental basis; and "assuming that there was 342 acres of cane land upon "the land sought to be condemned, what would you "say was the market value of the leasehold interest "on the 6th of July, 1901?

"Mr. DUNNE.—I object to the question as irrele- "vant, and incompetent, and not a proper or accurate "statement of the evidence; and without foundation "in this, that it does not appear that the witness does "know what the going market value was on July 6th, "1901.

"THE COURT.—Let the witness answer.

"Mr. DUNNE.—I note an exception.

"(EXCEPTION No. 33. And said plaintiff and "petitioner now assigns said ruling as error.)

"THE WITNESS.—I put an estimation on the "value of about one hundred and seventy-five thous- "and dollars.

Assignment of Error No. 32.

33.

Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked by said

Honolulu Plantation Company from the said witness, J. F. Morgan on re-direct examination: "How many mills "are there in the vicinity of this land?" Bill of Exceptions. Exception No. 34.

And in this behalf, this Specification of Errors now quotes the full substance of the evidence so admitted:

"Mr. SILLIMAN.—Q. How many mills are there "in the vicinity of this land?

"Mr. DUNNE.—I object to that as irrelevant, in- "competent, immaterial and not proper re-direct ex- "amination.

"THE COURT.—Ask the question.

"Mr. DUNNE.—We except.

"(EXCEPTION No. 34. And said plaintiff and "petitioner now assigns said ruling as error.)

"THE WITNESS.—A. There is the Honolulu "Plantation Company mill in right adjacent land to "this; the Oahu mill a little further on; then comes "the Ewa and the Waialua. I cannot say positively "how far the Honolulu mill is from this place, but it "looks to me it was within, I should say, about two "miles. I do not know how far away the Oahu mill "is."

Assignment of Error No. 33.

34.

Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked by said

Honolulu Plantation Company from the witness L. A. Thurston on direct examination: "Now, considering "the property sought to be condemned, Mr. Thurston, in "the state in which you saw it on the day that you visited "it last, and assuming that it was in substantially the "same state and condition on the 6th of July, 1901, and "taking into consideration the location of the land and "of the uses to which it might be put, and to which it was "adapted; and assuming the plantation has 39 years' "lease, 7 years' rental of which is paid up, and the rental "for 32 years thereof is on a basis of 3½ per cent. of the "sugar produced, and the payment of taxes (I will say "that the leasehold covers other lands, and has a mini- "mum rental of $4000, covering practically 2000 acres); "and assuming that there was 342 acres of cane land in "the area sought to be condemned, what is your opinion "of the market value of that leasehold interest on the 6th "of July, 1901?" Bill of Exceptions, Exception No. 35.

And in this behalf, this Specification of Errors now quotes the full substance of the evidence so admitted:

> "Q. Now, considering the property sought to be "condemned, Mr. Thurston, in the state in which you "saw it on the day that you visited it last, and assum- "ing that it was in substantially the same state and "condition on the 6th of July, 1901, and taking into "consideration the location of the land and of the uses "to which it might be put, and to which it was "adapted; and assuming the plantation has 39 years'

"lease, 7 years' rental of which is paid up, and the "rental for 32 years thereof is on a basis of 3 1-2 per "cent of the sugar produced, and the payment of "taxes (I will say that the leasehold covers other "land, and has a minimum rental of $4000, covering "practically 2000 acres); and assuming that there "was 342 acres of cane land in the area sought to be "condemned, what is your opinion of the market "value of that leasehold interest on the 6th of July, "1901?

"Mr. DUNNE.—I object to that as irrelevant and "incompetent, and not a faithful and accurate state- "ment of the evidence, and without any foundation in "this, that it does not appear that the witness knows "what the market value of this leasehold was on the "6th of July, 1901.

"THE COURT.—Answer the question.

"Mr. DUNNE.—We except.

"(EXCEPTION No. 35. And said plaintiff and "petitioner now assigns said ruling as error.)

"THE WITNESS.—A. I consider that a conser- "vative market value of that leasehold under the con- "ditions which you stated would be between seven "and eight hundred dollars per acre, for the 342 "acres of cane land."

Assignment of Error No. 34.

35.

Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked by said Honolulu Plantation Company from said witness L. A. Thurston on re-direct examination: "What can you say "as to the quality of the soil on the land sought to be con- "demned as to its producing any crop of sugar?" Bill of Exceptions, Exception No. 36.

And in this behalf, this Specification of Errors now quotes the full substance of the evidence so admitted:

"Mr. SILLIMAN.—Q. What can you say as to "the quality of the soil on the land sought to be con- "demned as to its producing any crop of sugar?

"Mr. DUNNE.—I object to that as irrelevant, im- "material and incompetent, and not proper re-direct "examination.

"THE COURT.—Ask the question.

"Mr. DUNNE.—We except.

"(EXCEPTION No. 36. And said plaintiff and "petitioner now assigns said ruling as error.)

"THE WITNESS.—A. I consider it first class "cane land."

Assignment of error No. 35.

36.

Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked by said Honolulu Plantation Company from the witness J. R.

Higby on direct examination: "Are you able to state "the value of the use of those buildings for the term of "39 years?" Bill of Exceptions, Exception No. 37.

And in this behalf, this Specification of Errors now quotes the full substance of the evidence so admitted:

> "Q. Are you able to state the value of the use "of those buildings for the term of 39 years?
>
> "Mr. DUNNE.—I object to that as irrelevant and "incompetent and upon the further ground that it "does not call for the market value, but calls merely "for an individual or personal value.
>
> "THE COURT.—The objection is overruled.
>
> "Mr. DUNNE.—We except.
>
> "(EXCEPTION No. 37. And said plaintiff and "petitioner now assigns said ruling as error.)
>
> "THE WITNESS.—If you assume that the build- "ings are valueless at the end of 39 years, I should "say that the life of those buildings would not be 39 "years. I would place the value of the use for the "term of 39 years at what they cost."

Assignment of Error No. 36.

37.

Said Court erred in overruling the objections of plaintiff and petitioner to the following question asked by said Honolulu Plantation Company from said witness J. R. Higby on direct examination: "Assuming that their life

"will be finished, what is the value of those buildings?"
Bill of Exceptions, Exception No. 38.

And in this behalf, this Specification of Errors now quotes the full substance of the evidence so admitted:

"Q. Assuming that their life will be finished, what "is the value of those buildings?

"Mr. DUNNE.—The same objection as heretofore "made. (Exception 37).

"THE COURT.—The objection is overruled.

"Mr. DUNNE.—We except.

"(EXCEPTION No. 38. And said plaintiff and "petitioner now assigns said ruling as error.)

"A. I have some notes that I made of the value of "the buildings. I am not exactly able to state the "value without refreshing my recollection from those "notes. The total value is about $11,000—a little "more than $11,000—not including the plumbing and "pipes."

Assignment of Error No. 37.

38.

Said Court erred in refusing to give to said jury the first instruction requested by said plaintiff and petitioner. Bill of Exceptions, Exception No. 39.

And in this behalf, this Specification of Errors now quotes the first instruction so refused:

"I instruct you that private property cannot be "taken for public use without just compensation.

"These are the words of our fundamental law, the "federal constitution; and from them you will ob- "serve that the compensation spoken of must be "'just.' In this behalf, I charge you that it is your "duty to treat both sides of this case with equal fair- "ness and impartiality, and to avoid giving to any "one side any preferment or advantage denied to the "other. In other words, when dealing with this "matter of compensation, you are to remember that "just compensation means compensation that is just "to both sides, just in regard to the public as well as "to the individual. You are not, for instance, to place "an unduly depreciative valuation upon this prop- "erty because the Government desires it; nor should "you place an exaggerated valuation upon the prop- "erty either because it is private property or because "the Government may want it. Your province is to "proceed and act throughout with even handed fair- "ness and impartiality, treating both sides alike, and "deciding disputed questions solely upon the evidence "received, and within the lines laid down by this "charge."

Assignment of Error No. 38.

39.

Said Court erred in refusing to give to said jury the second instruction requested by said plaintiff and petitioner. Bill of Exceptions, Exception No. 40.

And in this behalf, this Specification of Errors now quotes said second instruction so refused:

"I instruct you that whenever private property "is taken for public purpose, the fair market value of "the property at the time of the taking should be paid "for it; and according to the statute of this Territory "the actual value of the property at the date of the "summons is designated as the measure of valuation "of all property to be condemned; and I charge you "that the date of the summons in this case is July "6th, 1901. It is to this date, therefore, that you are "to look in fixing the value of the property involved "in this case. You are to remember that the ma- "terial matter for consideration is the actual condi- "tion of the property as it stood on that date. It is "to this that you are limited; and beyond this you "cannot go. The prospective or speculative value of "the land from possible improvements, or prospective "uses, cannot be considered by you; the value must be "actual, and not speculative or mere possible value, "nor argumentative value. It is not, therefore, "proper to consider how the property might be im- "proved, or the cost of such improvements; nor can "you consider what the probable value of the land "would be if this or that improvement were placed "upon it; nor can you consider the intention of the "lessee to make such improvements, even though you "should find any such intention to exist. In brief,

"you are to limit your consideration to the actual con-
"dition of this property as it actually stood on July
"6th, 1901."

Assignment of Error No. 39.

40.

Said Court erred in refusing to give to said jury the fourth instruction requested by said plaintiff and petitioner. Bill of Exceptions, Exception No. 41.

And in this behalf, this Specification of Errors now quotes said fourth instruction so refused:

"Some evidence has been introduced by the Gov-
"ernment showing certain valuations, sworn to, and
"filed with the Assessor, pursuant to the require-
"ments of the Territorial Statute in that regard.
"Upon this subject, I charge you that such sworn
"returns to the assessor are called by the law admis-
"sions against interest; and you say, therefore, and
"indeed it is your duty to do so, consider such sworn
"returns along with the other evidence in the case
"bearing upon the question of market value.

"In this connection, I charge you that the govern-
"ment has introduced here a certain writing of the
"Honolulu Plantation Company, making an annual
"exhibit of its affairs, and showing the assets of the
"defendant on January 1, 1901. I charge you that
"such writing and exhibit comes within the rule just
"stated concerning admissions against interest, and
"that it is your duty to consider such writing and ex-

"hibit in connection with the other evidence in the "case bearing upon the question of market value."

Assignment of Error No. 40.

41.

Said Court erred in refusing to give to said jury the fifth instruction requested by said plaintiff and petitioner. Bill of Exceptions, Exception No. 42.

And in this behalf, this Specification of Errors now quotes said fifth instruction so refused:

"You have been permitted to view the premises in "question. The object of this view was to acquaint "you with the physical situation, condition and sur- "roundings of the premises, and to enable you to bet- "ter understand the evidence on the trial. The knowl- "edge which you acquired by the view may be used "by you in determining the weight of conflicting "testimony respecting value and damage, but no fur- "ther. Your final conclusion must rest on the evi- "dence here adduced."

Assignment of Error No. 41.

42.

Said Court erred in refusing to give to said jury the sixth instruction requested by said plaintiff and petitioner. Bill of Exceptions, Exception No. 43.

And in this behalf, this Specification of Errors now quotes said sixth instruction so refused:

"In cases of this character, much of the testimony "consists in expressions of opinion touching the sub- "ject matter involved. It is your privilege to weigh "the testimony of witnesses whose opinions have "been given, by a reference to the whole situation of "the property and its surroundings, and all the at- "tendant circumstances, and by applying to it your "own experience and general knowledge. The evi- "dence of experts as to values and damages does not "differ in principle from the evidence of experts "upon other subjects. So far from laying aside "their own general knowledge and ideas the jury "may apply that knowledge and those ideas to the "matters of fact in evidence, in determining the "weight to be given to the opinions expressed. While "the jury cannot act in any case upon particular facts "material to its disposition resting in their private "knowledge, but should be governed by the evidence "adduced, they may and should judge of the weight "and force of that evidence by their own general "knowledge of the subject of inquiry; and while the "law permits the opinions of those familiar with "the subject to be given, such opinions are not to be "blindly received, but are to be intelligently exam- "ined, by the jury in the light of their own general "knowledge, giving them force and control only to "the extent that they are found to be reasonable. In "other words, you are not bound by the opinions of

"experts, but you will take their testimony into con-
"sideration, along with all other evidence in the case,
"and award to it such value as in your judgment it
"deserves."

Assignment of Error No. 42.

43.

Said Court erred in refusing to give to said jury the seventh instruction requested by said plaintiff and petitioner. Bill of Exceptions, Exception No. 44.

And in this behalf, this Specification of Errors now quotes the said seventh instruction so refused:

"In determining upon which side the preponder-
"ance of evidence is, you are not to be controlled by
"the mere number of witnesses produced, upon either
"side, but you should take into consideration the op-
"portunities of the several witnesses for seeing or
"knowing the things about which they testified,
"their conduct and demeanor while testifying, their
"interest or lack of interest, if any, in the result of
"the suit, the probability or improbability of the
"truth of their several statements in view of all the
"other evidence adduced or circumstances proved on
"the trial, and from all the circumstances determine
"upon which side is the weight or preponderance of
"evidence. In dealing with the testimony, you must
"not forget by whom it was given, the motive of the
"particular witness, if any, the purpose by which he
"is actuated, the partisanship, if any, attributable to

"him. Indeed, any fact or circumstance by which "his unbiased utterance of truth might be impeded "or prevented, altogether, must receive your atten- "tion. Thus, you would not, as men of sense, so "readily yield to the testimony of a witness whose "partiality is known or observable, as you would "have done had the same witness been wholly indif- "ferent between the parties, and with no partisan mo- "tive to actuate him—no interest in the result of the "trial other than the general interest which every "good citizen ought to feel, that in this, as in all other "trials, justice be done according to law."

Assignment of Error No. 43.

44.

Said Court erred in refusing to give to said jury the eighth instruction requested by said plaintiff and petitioner. Bill of Exceptions, Exception No. 45.

And in this behalf, this Specification of Errors now quotes said eighth instruction so refused:

"At arriving at a verdict in this case, you are to "give to the testimony such weight and effect as in "your judgment it deserves; but you should not treat "with such testimony arbitrarily or capriciously, nor "should you limit your consideration to any isolated "or fragmentary part thereof. On the contrary, you "are to take into consideration all the evidence in the

"case, both direct and circumstantial, together with "all reasonable inferences to be drawn from that evi- "dence."

Assignment of Error No. 44.

45.

Said Court erred in refusing to give to said jury the ninth instruction requested by said plaintiff and petitioner. Bill of Exceptions, Exception No. 46.

And in this behalf, this Specification of Errors now quotes said instruction so refused:

"In considering and deciding the facts in this case, "I charge you that the property sought to be con- "demned herein is the leasehold interest of the Hono- "lulu Plantation Company in and two 561.2 acres of "land, and nothing more. In passing upon the facts, "you will bear this constantly in mind."

Assignment of Error No. 45.

46.

Said Court erred in permitting to be rendered and in receiving the verdict herein. Bill of Exceptions, Exception No. 47.

And in this behalf, this Specification of Errors now states the grounds of this exception and of this specification of error as follows:

1. Insufficiency of the evidence to justify said verdict.

(a) There is no evidence to support the finding that the market value of the leasehold interest of said Honolulu Plantation Company in the land involved herein is of the sum of $94,000 or any other sum in excess of $75,000.

(b) There is no evidence to support the finding that the market value of all improvements upon said land is of the sum of $8,523, or any other sum.

(c) There is no evidence of the market value of said leasehold interest, or of any market value of said leasehold interest in excess of $75,000.

(d) There is no evidence of the existence upon said land of any improvements, or of the market value, if any, of any such improvements.

2. Said verdict is in opposition to, wholly inconsistent with and not supported by the former adjudication of said Court as to the compensation of said Honolulu Plantation Company:

And in this behalf this Specification of Errors shows that, in and by the judgment of said Court, in the above-entitled action (which said judgment is fully set out in the bill of exceptions herein) between the same parties, upon the same pleadings, and upon the same evidence, the "full compensation" of said Honolulu Plantation Company herein "for its damages of every kind and character in this case," was formerly, to wit, on July 25, 1902, adjudicated by said Court not to exceed the sum of $75,000.

3. Said verdict is contrary to and against the law and the evidence:

(a) Because of errors of law occurring during the trial, and excepted to by plaintiff and petitioner, said errors being included within the above and foregoing Specifications of Errors numbered herein from 1 to 45, inclusive.

(b) Because said verdict was made, given and rendered by a jury.

(c) Because said verdict was made, given and rendered without sufficient evidence to support, sustain or justify it; and in this behalf, this Specification of Errors refers to the paragraph herein above marked No. 1.

4. Said verdict is not sustained or justified by either the law or the evidence, or the weight of the evidence, herein:

(a) Because of the insufficiency of the evidence to justify said verdict, as set out in paragraph numbered 1, supra.

(b) Because said verdict is in opposition to, wholly inconsistent with and not supported by the former adjudication of said Court as to the compensation of said Honolulu Plantation Company, as more fully set out in paragraph 2, supra.

(c) Because said verdict is contrary to and against the law and the evidence, as more fully set out in paragraph 3, supra.

(d) Because said verdict was made, given and rendered by a jury.

(e) Because of the errors of law occurring during the trial and herein above assigned and enumerated.

5. Said verdict is excessive in this, that it attempts to award excessive, unreasonable and inconsistent compensation for damages herein, the amount thereof being without the evidence, with no evidence to support it and against the evidence, and against the former adjudication of said Court made July 25, 1902, and herein above referred to.

6. Said verdict is contrary to and against the charge of the Court herein:

(a) Because said jury failed to consider all the testimony as a whole, with all its reasonable inferences.

(b) Because said jury failed to consider the market value of the land involved in its actual condition on July 6, 1901.

(c) Because said jury considered speculative or possible value and not market value.

(d) Because said jury was neither guided or governed by the preponderance of evidence, or by the amount of just compensation to be awarded.

(e) Because said jury gave undue and excessive weight to the expert testimony introduced by said Honolulu Plantation Company.

Assignment of Error No. 46.

47.

Said Court erred in refusing to grant a new trial herein:

(a) Because said cause was illegally tried before a jury, instead of before a Court.

(b) Because said Court, in passing upon plaintiff and petitioner's motion for a new trial of said case, did not weigh all the evidence, and did not exercise its discretion to say whether or not, in its opinion, said verdict was so opposed to the weight of the evidence that a new trial should be granted; and did not accord to said plaintiff and petitioner its right to have all the evidence weighed by said Court, and to have said discretion of said Court exercised in the mode and manner just herein referred to.

Assignment of Error No. 47.

48.

Said Court erred in making, giving, rendering and filing its judgment herein upon and pursuant to said verdict.

Assignment of Error No. 48.

IMPROPRIETY OF JURY TRIAL.

In the Court below, the Government from the commencement to the close of this piece of litigation, was consistent in resisting a trial by jury; but, notwithstanding its objections, protests and exceptions, that form of trial was permitted. It appears from the verified application to correct the Bill of Exceptions, that after the petition had been

filed, and the various defendants began to make their appearance, there were preliminary questions to be disposed of; and in the interest of orderly procedure, it was proper that these preliminary questions should be disposed of before the main body of the litigation was taken up for consideration; and this practice has the approval of so eminent authority as Mr. Lewis, (2 Lewis, Eminent Domain, Sec. 388 et seq.). Of course, the first of these preliminary matters to be disposed of, was the settlement of the pleadings; and when that had been done, the next matter for consideration was the form which the trial should take—whether before the Court, or before a jury. The defendants, and among them the present defendant in error, insisted upon jury trials; their demands were resisted by the Government in each instance; but the Court below thought a jury trial to be the proper form of procedure. In the presentation and argument of these demands for jury trials, each of the defendants participated, as the minutes of the court show, the purpose of all concerned being that this question of jury trial should be, then and there, once and for all, finally determined so far as the lower Court was concerned; the purpose was so to settle this preliminary question as to avoid its recurrence in the future; and it was not in the contemplation of any of those participants that this question of jury trial should be reopened or reargued in the lower Court upon every occasion when the issues tendered by any particular defendant should come on for trial. The proceedings

were regarded as settling this matter of a jury trial; so much so, indeed, that this subject matter was not, thereafter, recurred to by either side of the litigation, not by any of the defendants again formally to demand a jury trial, nor by the Government again formally to object thereto; and this phase of the litigation was, by both sides, regarded as closed. Thereafter, the case of the present defendant in error came on to be heard; and it was the last case to be heard. It was treated, in this matter of jury trial, precisely as its predecessors had been treated; that is to say, nothing was said on either side for the purpose of reopening a question regarded as closed. When the lower Court decided to adopt the mode of procedure demanded by the defendants, he ordered the case of the first defendant on the list, the Estate of Bishop, to be set down for trial before a jury; and to this order, the Government then and there duly excepted, and preserved its exception in an appropriate bill of exceptions; and under all the circumstances, it was not conceived to be necessary to renew this exception, it being believed that one exception would be quite as good as many.

The subsequent history of the matter is detailed in the verified application on file in this court to correct the Bill of Exceptions, an application which fully illustrates the situation and counsel's understanding thereof.

The complaint of the Government in this regard further appears in Assignment of Error No. 46. It is there complained that the lower Court erred in permitting to be

rendered and in receiving the verdict herein, for the reason that said verdict is contrary to and against the law and the evidence, in this, that said verdict was made, given and rendered by a jury; and also for the reason that said verdict is not sustained or justified by either the law or the evidence, or the weight of the evidence, herein, in this, that said verdict was made, given and rendered by a jury. And the complaint of the Government in this respect, further appears in Assignment of Error No. 47, wherein it is complained that the lower Court erred in refusing to grant a new trial herein for the reason that the cause was illegally tried before a jury, instead of before a Court. It would seem that, if the Government be right in the position which it took, the errors complained of were fundamental errors, justifying a reversal of the judgment; for if the local statute designated the Court as the tribunal to determine the issues in this class of cases, the operation of the Act of Congress of August 1, 1888, would deny jurisdiction to refer the disposition of those issues to an essentially distinct and fundamentally different tribunal. If jurisdiction in the premises were vested by law in the Court, no authority existed to justify the delegation of that jurisdiction to a jury.

It is submitted that a vital objection of this kind, involving the character of the tribunal and the nature of its jurisdiction, is one which would be considered by the Court, *sua sponte,* even without any formal exception or assignment of error; it is submitted, in other words, that

the granting of this jury trial, even if "a plain error not assigned," is yet such an error as "the Court, at its option," should "notice" (Rule 11).

Minnesota vs. Hitchcock, 22 Sup. Ct. Rep., 650, 654; 185 U. S., 373.

General Doctrine as to Juries.—It is erroneous to suppose that a jury trial is proper in *all* cases; the rule never was intended to mean that.

Steamboat Co. vs. Foster, 48 Am. Dec., 256-260.
Ex parte Wall, 107 U. S., 265 (27-562).

California Illustrations:

Koppikus vs. State Cap. Com., 16 Cal., 253-5; Condemnation.
Grim vs. Norris, 19 Id. 142; Compulsory Reference in Equity.
Heynemann vs. Blake, 19 Id. 596-7; Condemnation.
Dorsey vs. Barry, 24 Id. 453; Contested Election Case.
Cassidy vs. Sullivan, 64 Id., 266; Divorce.
Curnow vs. B. G. Co., 68 Id., 262; Foreclosure of Mechanic's Lien.
Fish vs. Benson, 71 Id., 428; Ejectment, with equitable defense.
Taylor vs. Reynolds, 92 Id., 573; Common Law Misdemeanors only.

Ex parte Wong You Ting, 106 Id., 296; General Discussion.

In re Wharton, 114 Id., 367; Disbarment; construes "Court."

These few illustrations from a single State sustain the proposition that a jury trial is not proper in all cases; not in all civil cases; and not even in all criminal cases; but only in those cases, whether civil or criminal, in which it was proper at common law.

Indeed, the general doctrine is thus clearly summarized:

"The preservation of the common law right to trial by "jury is guaranteed by the United States Constitution as "well as by the fundamental law of the several States. "These constitutional provisions are construed as preserv- "ing the right in substance as it existed at the time of the "adoption of the Constitution and in the classes of cases "to which it was then applicable."

17 Am. & Eng. Ency., 2d Ed., p. 1097.

And so Brewer, J.:

Walker vs. R. R., 165 U. S., 595-6.

JURIES IN CONDEMNATION CASES.

When not restrained by constitutional limitations, legislative control over the procedure and mode of compensation is unfettered:

1 Lewis, Em. Dom., sec. 245.

Randolph, Em. Dom., sec. 315.
Lynch vs. Forbes, 161 Mass., 308.
R. R. vs. Schmidt, 177 U. S., 236.

In the absence, then, of any special constitutional provision, the legislature may provide such mode as it sees fit for ascertaining the compensation, provided only that the tribunal is an impartial one, and that the parties interested have a nopportunity to be heard; and a Court or Judge, with or without a jury, is an impartial tribunal.

2 Lewis, ubi supra, 313, 365.
Hallinger vs. Davis, 146 U. S., 314.
Backus vs. Fort St. Co., 169 Id., 569.

When we turn to the various State constitutions we find the widest differences in their provisions relating to jury trials in condemnation cases. Some—the greatest number, in fact—do not require or provide for a jury at all; some provide for a "jury" simply, without establishing its character; some provide for "a jury of twelve "men"; some provide for "a jury of twelve freeholders"; some provide for "a jury of twelve or not less than three "commissioners"; some provide for "a common law "jury;" and some provide for "a common law jury on "appeal only."

The following constitutions refer to a jury in some form or other:

1. Alabama: "a jury"; on appeal only; on demand only.

2. California: "common law jury"; waiver of jury permitted; Const. of 1879 only.
3. Colorado: "jury of twelve men, or not less than three commissioners"; waiver permitted.
4. Florida: "jury of twelve men"; no waiver allowed.
5. Illinois: "a jury"; no waiver allowed.
6. Iowa: "a jury"; no waiver allowed.
7. Kentucky: "common law jury on appeal only"; no waiver allowed.
8. Maryland: "a jury"; no waiver allowed.
9. Michigan: "jury of twelve men, not less than three commissioners"; no waiver allowed.
10. Missouri: "a jury or not less than three commissioners"; no waiver allowed.
11. Montana: "a jury"; as to private roads only; no waiver allowed.
12. New York: "a jury or not less than three commissioners"; no waiver.
13. North Dakota: "a jury"; waiver allowed.
14. Ohio: "a jury"; no waiver.
15. Pennsylvania: "common law jury"; on appeal only; only in condemnations by municipal corporations.
16. South Carolina: "a jury of twelve men"; right of way cases only; no waiver.
17. South Dakota: "a jury"; no waiver.
18. Washington: "a jury"; unless jury waived.
19. West Virginia: "jury of twelve freeholders"; on demand only.

20. Wisconsin: "a jury"; as to municipal corporations only, and then only as to necessity of taking, but not as to compensation.

The following constitutions do not require or provide any jury at all:

1. *United States* (5th and 14th Amendments).
2. *Arkansas.*
3. *Connecticut.*
4. *Delaware.*
5. *Georgia.*
6. *Idaho.*
7. *Indiana.*
8. *Kansas.*
9. *Louisiana.*
10. *Maine.*
11. *Massachusetts.*
12. *Minnesota.*
13. *Mississippi.*
14. *Nebraska.*
15. *Nevada.*
16. *New Hampshire.*
17. *New Jersey.*
18. *North Carolina.*
19. *Oregon.*
20. *Rhode Island.*
21. *Tennessee.*
22. *Texas.*
23. *Vermont.*

24. *Virginia.*
25. *Wyoming.*

Randolph, Em. Dom., p. 401, et seq.

Not only do the majority of the States fail to require a jury, but the differences among the States are further illustrated by the marked differences among those States themselves which do advert to this subject at all. Thus, limiting one's remarks to the twenty States whose constitutions make any reference to a jury trial at all, we find the following divergent provisions:

First Class of Differences:

"A jury"; 11 States.
"A jury of twelve men"; 2 States.
"Jury of twelve freeholders"; 1 State.
"Jury or not less than three commissioners"; 3 States.
"Common law jury"; 2 States.
"Common law jury on appeal only"; 1 State.

Second Class of Differences:

Jury on demand only; 2 States.
Jury on appeal only; 2 States.
Jury in way cases only; 2 States.
Jury in municipal corporations only; 2 States.
Waiver provided; 6 States.
No waiver provided; 14 States.

Other differences might be pointed out if necessary, but these will suffice for the present. These differences as

among the several States should constantly be borne in mind; because unless there be a similarity between the provisions of other States and the provisions obtaining in this jurisdiction and in this forum, the decisions of those other States are effectually differentiated and without value; for nothing can be more misleading than to follow an authority without reference to the particular language of the constitution or statute under which it was decided.

In further illustration of these differences among the States, in further illustration of the discount to which authorities should be subjected when cited from States whose laws are at variance from those controlling in this forum, I point out that not only do the States differ among themselves as to this matter of jury trial in condemnation cases, but also that the same State, at different periods of its constitutional history, frequently exhibits a marked difference in its constitutional policy concerning this subject-matter. Under such circumstances we find a corresponding change in judicial utterances; the caution which I have just suggested comes again into play; and it becomes important to inquire into the terms of the constitution or statute in force at the time of the decision.

A notable illustration of this will be found in the constitutional history of California.

Const. 1849; Art. I, sec. 3; Art. I, sec. 8.

Hoppikus vs. State Cap. Com., 16 Cal., 249, 253-5; Field, C. J.; 1860.

Heynemann vs. Blake, 19 Id., 579, 596-7; Field C. J.; 1862.

Dorsey vs. Barry, 24 Id., 449, 453-4; 1864.

Const. 1879; Art. I, sec. 14.

San Diego Land Co. vs. Neale, 78 Cal., 63, 72; 1888.

Whatever, then, may be the rule in other States, whatever may be the rule at particular junctures in the constitutional history of any special State, the authorities are uniform in holding that, in the absence of an express constitutional requirement, a jury trial is not a matter of constitutional right; and in the practical administration of their jurisprudence, all such States, as the reports consistently show, invariably indicate their views by rejecting that mode of trial. Not one well-considered opinion can be produced which holds that, in the absence of an express constitutional requirement, it is error to refuse a jury trial in condemnation cases; and this unbroken current of judicial opinion, these practical views as to the propriety of jury trials in cases of this class, should not be without controlling weight.

2 Lewis, ubi supra, sec. 311.

Brannon, XIV Amend., 468.

Scudder vs. D. T. Falls Co., 23 Am. Dec., 756.

Flint River S. Co. vs. Roberts, 48 Id., 178.

Flint River S. Co. vs. Foster, Id., 248; same as Hawaii.

Bonaparte vs. R. R., 1 Bald. (U. S.), 205.

G. F. Mfg. Co. vs. Garland, 25 Fed. Rep., 521; affirmed, 124 U. S., 581.

U. S. vs. Engeman, 46 Id., 176.

U. S. vs. Jones, 109 U. S., 513.

Wurtz vs. Hoagland, 114 Id., 606.

R. R. vs. Humes, 115 Id., 512.

Lent vs. Tillson, 140 Id., 316.

Monongahela Nav. Co. vs. U. S., 148 Id., 312.

Water Co. vs. Brooklyn, 166 Id., 685.

Bauman vs. Ross, 167 Id., 548.

Backus vs. Fort St. Co., 169 Id., 557.

Whiteman's Executrix vs. R. R., 2 Harr. (Del.), 514.

Beekman vs. R. R., 3 Paige, Ch., 45; same as Hawaii.

Livingston vs. New York, 8 Wend., 85.

Willyard vs. Hamilton, 7 Ohio, Part II, p. 111.

Anderson vs. Caldwell, 91 Ind., 451.

People vs. R. R., 3 Mich., star p. 504.

Ames vs. R. R., 21 Minn., 292-3.

Plank Road vs. Pickett, 25 Mo., 537-8.

Koppikus vs. State Cap. Com., 16 Cal., 249.

Heynemann vs. Blake, 19 Id., 579.

Backus vs. Lebanon, 11 N. H., 26-7; same as Hawaii.

Dalton vs. North Hampton, 19 Id., 364.

People vs. Smith, 21 N. Y., 598-9.

Gold vs. R. R., 19 Vt., 478.

Johnson vs. R. R., 23 Ill., 130.

Oliver vs. R. R., 9 S. E. (Geo.), 1087-8.
State vs. Heppenheimer, 54 N. J. L. (23 Atl., 664), 268: military condemnation.
State vs. Lyle, 100 N. C., 497.
R. R. vs. Parker, 105 Id., 248.
R. R. vs. Baltzell, 23 Atl. (Md.), 74.
St. Joseph vs. Geiwitz, 148 Mo., 216.
R. R. vs. R. R., 118 Id., 617.

Limited Issues in Condemnation Proceedings.—It will be observed that those authorities point out the limited issues which arise in condemnation proceedings. Adopting the most latitudinarian construction, the possible questions could involve only "adverse or conflicting claims to the property * * *" (Civil Laws, Sec. 1552), or the question of the necessity of the condemnation, or the question of compensation. No other possible questions can arise in this class of cases. Some tribunal must determine these questions, or such of them as are open to judicial inquiry; and my insistence is that, in the language of the statute, the Court, and not a jury, shall determine them.

1. *Adverse or Conflicting Claims.*—But counsel may refer to the subject of adverse or conflicting claims; he may suggest that Section 1552 of the local law relates to conflicting claims, but not to damages; and he may urge that it is, in effect, an interpleader statute. But if there were conflicting claims before the Court, there would be nothing in that circumstance to oust the Court of juris-

diction to hear them. The object of creating this Court, and its judicial functions, involve necessarily the adjudication of conflicting claims; and if the theory referred to were sound, the occupation of the Court would vanish, like Othello's.

Ex parte Wall., 107 U. S., 265.

But in this case, however, there are no adverse or conflicting claims, either to property or compensation. The claim of each defendant is independent and distinct from that of his co-defendant. Each defendant is seeking what is justly due him or his interest, without any invasion of, or encroachment upon, the rights or interests of his co-defendants. Adverse parties make no conflicting claims here to the same property or compensation. All rights, interests or possessions here are subordinate to the true title. No hostile claims of title, right or interest are asserted. The respective interests of the various defendants are recognized by all; and when compensation shall be awarded them, it will be apportioned among them according to their respective rights and interests. Do any of these lessees contest or impeach the title of their landlords? And if they should attempt it, would not the law be swift to estop them? Do any of these lessors create any conflict against their lessees? Does any defendant here set up an adverse claim to the franchise of the Oahu Railway and Land Company? Have we heard of any conflicting or adverse claim against the bonds held by Bishop and Company? In other words, while there may be dif-

ferent or varied interests here, yet those interests are neither adverse nor conflicting.

2 Lewis, ubi supra, Sec. 483; and note 29.

As already hinted, even if there were adverse or conflicting claims, they could not be permitted to interfere with the progress of the condemnation proceedings. "The "march of public improvement cannot thus be stayed by "uncertainties, complications or disputes regarding the "title to property sought to be condemned" (Brown, J., in U. S. vs. Dunnington, infra); and the rule is now firmly settled by the Supreme Court that, if the owner of the land be unknown, or if there are conflicting claims, or if there should be doubt for any reason as to who is entitled to the compensation, the money may be paid into court, a clear title obtained, and the adverse claimants left to litigate their differences elsewhere.

U. S. vs. Dunnington, 146 U. S., 338.
Jones vs. R. R., 41 Fed. Rep., 70.
2 Lewis, ubi supra, sec. 627.
10 Am. & Eng. Ency., 2d Ed., 1195.

Any reference to the doctrine of interpleader would also be unfortunate, for the obvious reason that the underlying thought of that doctrine is that the adverse or conflicting claims shall run against the same right or property. But does Bishop and Company demand here the compensation which may be awarded a tenant of the

Bishop estate? Is the R. R. Co. seeking here the compensation which may be awarded the John II estate? And upon what principle would interference be tolerated by one of these sugar plantations with the compensation due the R. R. Co. for the condemnation of its franchise? It must be obvious that there are no adverse or conflicting claims here, in any accepted sense of the doctrine of interpleader.

Pfister vs. Wade, 56 Cal., 43.
Wells vs. Minor, 25 Fed. Rep., 533.
Standley vs. Roberts, 59 Id., 841.

2. *Necessity of Condemnation.*—In the next place, the authorities establish the proposition that all questions as to the necessity, propriety or expediency of the exercise of the power of eminent domain are exclusively for the legislature to decide. None of such questions are judicial; and the citizen is not entitled to be heard upon the question of necessity. All these questions, then, are purely legislative. They are not judicial; they are not questions for the courts at all; they are not questions for a jury at all. The necessity for this naval station was exclusively for the United States Government to decide. Its decision upon that subject is not open to judicial review; and these defendants are not entitled to have that question litigated, whether before court or jury.

Secombe vs. R. R., 23 Wall., 109.
Broom Co. vs. Patterson, 98 U. S., 403, 406.

Shoemaker vs. U. S., 147 Id., 282.
U. S. vs. G. E. R. R., 160 Id., 688.
Wulzen vs. S. F., 101 Cal., 15; 40 A. S. R., 17.
1 Lewis, ubi supra, sec. 237-8, 277, 158 et seq.
10 Am. & Eng. Ency., 2d Ed., 1052, 1067-8, 1070.
Bonaparte vs. R. R., Baldw. (U. S.), 205.
De Varaigne vs. Fox, 2 Blatch. (U. S.), 95.
U. S. vs. Oregon R. R., 16 Fed. Rep., 524.
Patterson vs. Broom Co., 3 Dillon (U. S.), 465.
2 Lewis, ubi supra, sec. 393, note 32.
U. S. vs. Engeman, supra.
Holt vs. Sommerville, 127 Mass., 410.

3. *Compensation.*—But when we turn to the element of compensation, we find it to be a purely personal claim, entirely independent of the title to the land.

10 Am. & Eng. Ency., 2d Ed., p. 1189.
Tenbrooke vs. Jahke, 77 Pa. St., 392.
Liverman vs. R. R., 114 N. C., 692.

The sole purpose of condemnation proceedings is to fix compensation, just alike to both parties, for the property taken.

O'Hare vs. R. R., 139 Ill., 151.
Lamb vs. Schottler, 54 Cal., 319.
Garrison vs. N. Y., 21 Wall., 196.

But it is precisely upon this question of just compen-

sation that no jury trial is required by the constitution of the United States.

> Bauman vs. Ross, 167 U. S., 593: Gray, J.
> Backus vs. Fort St. Co., 169 Id., 569: Brewer, J.

Chappell vs. U. S., 160 U. S., 499.—In support of their claim for a jury, counsel will, judging from past experience, cite and lay great stress and reliance upon this case; and I shall, therefore, devote a brief space to its consideration.

1. *Nature of the Case.*—The case arose in Maryland, where, as we have seen, the local law required a jury. The proceeding was one to condemn a perpetual easement in a strip of fast land for the purpose of facilitating the lighting of a ship channel. A demurrer was overruled, and a jury ordered, impaneled and sworn. A trial was had upon the question of the assessment of damages. Chappell was present and participated in that trial. Evidence was heard from both sides, and a verdict of $3,500 damages was found.

Then Chappell attacked the jurisdiction of the Court, claiming that he was sued in the wrong county; and also the verdict of the jury, claiming that the amount found was too low; but nowhere did he claim that he did not get a jury trial. His objections, however, were overruled, and the award was confirmed.

Upon his writ of error, he contended that he was entitled to a trial *de novo* before the appellate tribunal; and

that he did not have a jury trial below because not properly brought into Court. In reply, the Attorney General never once discussed the general right of trial by jury, but contented himself with urging an estoppel of Chappell, based upon his participation in the jury trial, which was actually had below.

The opinion on appeal was written by Mr. Justice Gray, to whose subsequent opinions I shall hereafter refer. It illustrates the limited scope of the case. It shows that the large question of the constitutional right to a jury trial under a constitution which does not require it in this class of cases, was not involved or passed upon; and it points out that, aside from the denial of the constitutionality of the Act of 1888, the only other question was whether a Maryland rule would be federally recognized which would entitle Chappell to a second jury trial of the whole case subsequent to the jury trial of the question of damages. (160 U. S., 512.) This latter question was decided adversely to Chappell and the judgment affirmed.

2. *What Was Involved.*—It is thus plain that the Chappell case is not an authority upon the question presented here, for the obvious reason that such question was not involved. Nor will the language of Gray, J., bear the construction that a jury trial is always a matter of right, whatever the language of the local law, or whatever the jurisdiction. He mentions the "general rule" of the Revised Statutes, and then employs the very significant phraseology that "Congress has not itself provided any

"peculiar mode of trial in proceedings for the condemna-
"tion of lands for public uses"; and this remark, while strictly so of Maryland, is not so of Hawaii, wherein, as I shall hereafter show, Congress *has* provided an established mode of trial in this class of cases.

Justice Gray then suggests that the Act of 1888 "is not "to be construed as creating an exception to the general "rule of trial by an ordinary jury in a court of record." Manifestly not, because by the terms of that Act, this question of jury or no jury is, in terms, left to the local law for regulation, just as are all other matters or forms of procedure. The Act of 1888 establishes no exception touching this matter of a jury; it is non-committal; it does not operate either way; it neither establishes any rule, nor "creates any exception," relative to jury trials; and it is silent on that subject, when it might have spoken; it provides merely that the local law shall be conformed to, without engrafting either extension or limitation thereon; and it relegates all forms of procedure to the local legislators, whose control over procedure is unfettered, save by constitutional limitations. And Justice Gray very properly said that the double jury theory would be a useless and ill-advised incumbrance upon the administration of justice, that Chappell had the benefit of an ordinary jury trial on the question of damage, and that he was not entitled to a second trial by jury.

This is the whole of the Chappell case. It did not appear that Chappell was denied the trial by jury given

him by the local law, but the contrary appeared, and no question of that character was involved in the appeal. If the local law had denied him a jury trial, and if the constitutionality of that denial had been adjudicated on this appeal, the case might become an authority here; but no such questions were thought of, and the decision is chiefly valuable as illustrating Chappell's voraciousness,—he wanted two jury trials when the local law allowed him only one.

3. *Its Limitations.*—(a) In general:

Black, Interp. Laws, p. 391.

(b) If considered in point, its isolation:

Black, ubi supra, p. 411.

And its isolation is illustrated by the following cases:

Earlier Cases:

G. F. Mfg. Co. vs. Garland, 25 Fed. Rep., 524-5; affirmed, 124 U. S., 581.

Jones vs. U. S., 109 U. S., 513.

Wurtz vs. Hoagland, 114 Id., 606; Gray, J.

Later Cases:

Water Co. vs. Brooklyn, 166 Id., 685; citing Cooley, Const. Lim., star p. 563, quod vide.

Bauman vs. Ross, 167 Id., 548; Gray, J.; and see p. 593.

Backus vs. Fort St. Co., 169 Id., 557. See p. 569.

Even upon the assumption that my opponent's interpretation of this authority is sound, then these later cases, by their want of harmony with the Chappell case, practically overrule it (Asher vs. Texas, 128 U. S., 129).

According to the doctrine of these later cases, all questions of procedure, including trial by jury, are relegated to the judgment of the local legislature; this is the last word of the Supreme Court upon this subject; to this doctrine, Justice Gray subscribes; and since I do not believe that he stultified himself, or that the Court did, I submit that the Chappell case is not a controlling authority on the question here presented.

RATIO DECIDENDI OF FOREGOING AUTHORITIES.—I have pointed out that in the absence of any express constitutional restriction, the authorities almost uniformly hold that, in cases of this class, trial by jury is not a matter of constitutional right, and the line of reasoning upon which these decisions are founded is that, before any of our constitutions were adopted, it had been the policy in America and England to ascertain the compensation to be paid for property taken for public use, by other agencies than a common law jury; that this practice was well-known to the framers of these constitutions and that presumably they did not intend by any general language employed to abrogate a practice so universal and of such long standing, and against which no complaint existed.

2 Lewis, Em. Dom., sec. 311.

The meaning of this idea suggests at once the historical limitations upon the right to trial by jury, as those limitations are established by the authorities.

"Whenever the right to this trial is guaranteed "by the constitution without qualification or restric- "tion, it must be understood as retained in all those "cases which were triable by jury at the common "law."

Cooley, Const. Limit., 5th Ed., star p. 319.

"The constitutional provisions do not extend the "right; they only secure it in the cases in which it "was a matter of right before."

Cooley, ubi supra, star p. 410.

"The right is preserved in substance as it existed "at the time of the adoption of the constitution, and "in the classes of cases to which it was then appli- "cable."

6 Am. & Eng. Ency., 2nd Ed., 974.

"The preservation of the common law right to "trial by jury is guaranteed by the United States "Constitution as well as by the fundamental law of "the several States. These constitutional provisions "are construed as preserving the right in substance "as it existed at the time of the adoption of the Con-

"stitution and in the classes of cases to which it "was then applicable."

17 Am. & Eng. Ency., 2nd Ed., 1097.

"In view of the way in which the guaranty of trial "by jury is expressed in the seventh amendment and "in the State constitutions, as adverted to above, it "is settled by the courts that the guaranty merely "preserves this right and does not extend it. Con- "sequently, a trial after this method may be claimed "as a matter of constitutional right only in those "cases where it could have been demanded, as of "right, under the common or statutory law which "was in force at the time the constitution was "adopted."

Black, Const. Law, p. 514-5.

These views of the text writers are amply supported by the following authorities, *inter alia*:

Commrs. vs. Morrison, 22 Minn., 178.
Cassidy vs. Sullivan, 64 Cal., 266.
Backus vs. Lebanon, 11 N. H., 19.
Stilwell vs. Kellogg, 14 Wisc., 461.
Byers vs. Com., 42 Pa. St., 89.
Sands vs. Kimbark, 27 N. Y., 147.
McGear vs. Woodruff, 33 N. J. L., 216.
Hagany vs. Cohnen, 29 Ohio St., 82.
Lavey vs. Doig, 25 Fla., 611; 6 So. Rep., 261.
Steamboat Co. vs. Foster, 48 Am. Dec. (Geo.), 248.

Anderson vs. Caldwell, 46 Am. Rep. (Ind.), 613.
Wyncoop vs. Cooch, 89 Pa. St., 451.
Ross vs. Irving, 14 Ill., 171-181.
Tabor vs. Cook, 15 Mich., 322; Cooley.
R. R. vs. Baltzell, 23 Atl. (Md. 1891), 74.
Grim vs. Norris, 19 Cal., 140, 142.
Ex parte Wong You Ting, 106 Id., 297.
Callan vs. Wilson, 127 U. S., 540.
Walker vs. R. R., 165 U. S., 595-6.
Copp vs. Henniker, 55 N. H., 179.
Opinion Judges, 41 Id., 550.
Dane Co. vs. Dunning, 20 Wisc., 221, 228.
Gaston vs. Babcock, 6 Id., 503.
R. R. vs. Ferris, 26 Texas, 588, 595.
Howe vs. Plainfield, 37 N. J. L., 145.
Dillman vs. Cox, 23 Ind., 440.
Allen vs. Anderson, 57 Id., 388.
McMahon vs. Works, 72 Id., 19.
Vaughn vs. Scade, 30 Mo., 600.
State vs. McClear, 11 Neb., 39.
Work vs. State, 59 Am. Dec., 671, 675, 676.
Haines vs. Levin, 51 Pa. St., 414.
Rhines vs. Clark, Id., 96.
State vs. Almy, 67 N. H., 274. "Trial by jury, in "Art. 16 of the Bill of Rights, is common law "language used in its common law sense."

The Common Law as Applied to the Constitution. —The principles established by the foregoing authori-

ties—the principles concerted in the graphic phrase of the New Hampshire Court—teach us that the source of this branch of our constitutional jurisprudence is to be traced to the common law; that in this phrase as in others the Federal Constitution was drafted in a common law atmosphere, by men who were bred in common law doctrines; and that its construction should be conditioned and moulded by common law ideas, principles and modes of thought. It is laid down that a constitution should be construed with reference to the doctrines of the common law (Costigan vs. Bond, 65 Md., 122; 3 Atl., 285); and to no organic act is this rule more applicable than to the Federal Constitution.

In tracing the sources of American constitutional jurisprudence, it is perceived that the system of government established by the Constitution of the United States had no exact historical precedent. In a sense, it was a creation and an experiment. But the framers of the Constitution, although without a model for the whole structure, were guided by the wisdom and experience of the mother country; their action was determined by theories and ideas inherited from the mother country; and our Constitution owes many of its provisions to that of Great Britain, as the latter then stood.

Thus, the idea of a representative government instead of a direct democracy, the principle of majority rule, the necessity of separating the three departments of government, the bicameral system in legislation, the doctrine of

local self-government, and the balancing of centrifugal and centripetal forces,—all these principles, and more, were incorporated into our Constitution as a matter of course, and because they were essential parts of the Anglo-American idea of government. Almost without exception, the great guarantees which secure the natural, civil and political rights of the citizen, and protect him against tyranny or oppression, were derived from the great charters and legislative enactments of Great Britain which had become a fixed part of her constitution, or, in other words, from that common law which the Americans claimed as their natural heritage and shield.

Among these rights, we will notice those of due process of law, trial by jury in certain classes of cases, the benefit of the writ of habeas corpus, security against unreasonable searches and seizures, and many of the rights secured to persons on trial for criminal offenses; and the several States in framing their constitutions, have been guided and influenced by the same doctrines and theories, and by the prevalence of the same political ideas among the people, and also, in later times, by the Federal Constitution.

In illustration of this conception of resort to the common law, and the light which it throws upon our Constitution, it may be pointed out that in the Declaration of Rights put forth by the Continental Congress in 1774, thirteen years prior to the date of the Federal Constitution (Sept. 17, 1787), was the following clause:

"The respective colonies are entitled to the com-
"mon law of England, and more especially to the
"great and inestimable privilege of being tried by
"their peers of the vicinage *according to the course*
"*of that law.*"

And it is observed by Mr. Justice Story:

"The universal principle (and the practice has
"conformed to it) has been that the common law is
"our birth-right and inheritance, and that our ances-
"tors brought hither with them upon their emigra-
"tion all of it which was applicable to their situation.
"The whole structure of our present jurisprudence
"stands upon the original foundations of the com-
"mon law."

1 Story, Const., sec. 159.

The Federal Bill of Rights is contained in the first eight (or ten) amendments; the idea, as well as the name, of a bill of rights, undoubtedly originated in certain great charters of liberty well known in English constitutional history, and particularly the Bill of Rights, passed in the first year of the reign of William and Mary, A. D., 1689; and according to the Supreme Court:

"The object of the first eight amendments to the
"Federal Constitution was to incorporate into it cer-
"tain principles of natural justice which had be-
"come permanently fixed in the jurisprudence of the
"mother country, and therefore the construction

"given to those principles by the English Courts is "cogent evidence of what they were designed to se- "cure, and of the limitations which should be put "upon them."

Brown vs. Walker, 161 U. S., 591.

It is observed by Mr. Justice Bradley, that the common law "is the system from which our judicial ideas "and legal definitions are derived. The language of the "constitution and of many acts of Congress could not be understood without reference to the common law."

Moore vs. U. S., 91 U. S., 270.

And still later it was further observed by the same Court:

"There is one clear exception to the statement that "there is no national common law. The interpreta- "tion of the constitution of the United States is nec- "essarily influenced by the fact that its provisions "are framed in the language of the English common "law, and are to be read in the light of its history. "The code of constitutional and statutory construc- "tion which, therefore, is gradually formed by the "judgments of this court, in the application of the "constitution and the laws and treaties made in pur- "suance thereof, has for its basis so much of the "common law as may be implied in the subject, and

"constitutes a common law resting on national au-
"thority."

Smith vs. Alabama, 124 U. S., 465.

These principles are not without meaning and force; they point the philosophy of the doctrine which I am seeking to impress upon the mind of the Court. If, in the construction of the constitution, the common law, in whose atmosphere it was moulded and by whose principles it is conditioned, should be taken into the account, what shall be said of that canon of the common law, settled from time immemorial, by which the compensation to be paid for property taken for public use, was ascertained by agencies other than a common law jury?

If the common law construction placed on those principles of natural justice now incorporated into the first eight amendments is cogent evidence of their limitations, will this court ignore all the basic ideas of Anglo-Saxon jurisprudence, neglect the teachings of its history, its most learned jurists and its most exalted tribunals, overturn the historical limitations which the common law impressed upon trial by jury, and extend that form of trial to a class of cases in which, at common law, as the foregoing authorities demonstrate, it was never entertained?

As remarked by the Supreme Court, in its latest deliverance upon this subject, there is nothing whatever in the United States constitution which either rejects or requires a jury in this class of cases; neither in the constitution nor in the acts of Congress is any rule on this

subject established; as remarked in the Chappell case, there is nothing exceptional in this behalf in the act of 1888, the obvious reason being that this act relegates the entire subject-matter to the discretion of the local legislature, and directs the Federal Courts to accommodate their procedure to the local regulations; the history of the common law, and the application of its principles to constitutional construction, alike concur in rejecting this mode of trial; and the Supreme Court has formulated a doctrine in perfect conformity with that to which I hope to gain this Court's adherence, when it refers the settlement of all such controversies as this to the local law as construed by the local courts.

Federal Jurisdiction.—Bearing the foregoing principles in mind, let us approach the federal jurisdiction in cases of this class. By virtue of the delegation to the federal government of certain of the sovereign powers vested in the States, the federal government, upon compensation made, has the right to condemn any lands held by private owners, within its borders, for any purpose necessary to the due exercise of the powers so delegated; and all rights of private ownership are qualified by this principle.

Cooley, Const. Lim., 526.
Reddall vs. Bryan, 74 Am. Dec., 550.
U. S. vs. Oregon R. R., 16 Fed. Rep., 524.
Stockton vs. R. R., 32 Id., 17.
New Orleans vs. U. S., 10 Peters, 723.

U. S. vs. Jones, 109 U. S., 513.
10 Am. & Eng. Ency., 2nd Ed., 1142, note 2.
Darlington vs. U. S., 22 Am. Rep., 766.
G. F. Mfg. Co. vs. Garland, 25 Fed. Rep., 521.
McCullough vs. Maryland, 4 Wheat., 429.
Kohl vs. U. S., 91 U. S., 367.
Luxton vs. Bridge Co., 153 Id., 525.

The necessity, occasion, time and manner of the exercise of this power, are purely and wholly legislative questions; and while the question whether a particular use is public or not, is a judicial question, yet "when the use "is public, the necessity or expediency of appropriating "any particular property, is not a matter of judicial cog- "nizance."

Secombe vs. R. R., 23 Wall., 109.
Boom Co. vs. Patterson, 98 U. S., 403, 406.
Shoemaker vs. U. S., 147 Id., 282.
U. S. vs. G. E. R. R., 160 Id., 688.
Wulzen vs. S. F., 101 Cal., 15; 40 A. S. R., 17.
1 Lewis, ubi supra, sec. 237-8, 277, 158 et seq.
10 Am. & Eng. Ency., 2nd Ed., 1052, 1067-8, 1070.
Bonaparte vs. R. R., Baldw. (U. S.), 205.
DeVaraigne vs. Fox, 2 Blatch. (U. S.), 95.
U. S. vs. Oregon R. R., 16 Fed. Rep., 524.
Patterson vs. Boom Co., 3 Dillon (U. S.), 465.

In the exercise of this power, Congress may create a special tribunal for condemnation cases and purposes;

or it may adopt the tribunals of the States; or it may authorize purely common law proceedings in the Courts of the United States. It is indeed settled law, by all the authorities, that this entire subject-matter is committed to the sound discretion of the legislature; and in the absence of direction by Congress as to the tribunal or mode of procedure, an action at common law would lie in the name of the United States in the district in which is situated the land to be condemned. Congress has always shown a disposition to assimilate federal and local procedure:

Criminal Cases, Roe, Fed. Crim. Proc., p. 28.
Civil Cases, R. S., 914.
Condemnation Cases, Act of Aug. 1, 1888.

Congress has, however, legislated upon this subject:

Act of Aug. 1, 1888: 25 Stats. Large, 357; 1 Supp. R. S., 601.
Jones vs. U. S., 48 Wisc., 385.
In re Secty. Treas., 45 Fed. Rep., 396.
U. S. vs. Engeman, Id., 546.
Lumber Co. vs. U. S., 69 Id., 320.
Chappell vs. U. S., 81 Id., 764.
U. S. vs. Tennant, 93 Id., 613.
Luxton vs. Bridge Co., 147 U. S., 337.

This principle of conformity to local law brings me to the Hawaiian law of eminent domain.

The Hawaiian Constitution.—The history of constitutional government in the Hawaiian Islands shows that during 60 years prior to the adoption of the present Organic Law, five constitutions have been in effect:

First: Kamehameha III; Adopted October 8, 1840.

Second: Kamehameha III; Adopted Dec. 5, 1852; Decl. Rights, Acts. 6, 10, 15.

Third: Kamehameha V; Adopted Aug. 20, 1864; Arts. 7, 9, 14.

Fourth: Kalakaua; Adopted July 7, 1887; Arts. 7, 9, 14.

Fifth: Republic; Adopted July 4, 1894; Art. 6, sec. 3; Art. 12.

It was under this last constitution, and two years after it went into effect, that the Hawaiian Eminent Domain Act was adopted:

Session Laws, 1896, Act 45.

Construction of Hawaiian Constitution.—Pursuant to what constitutional limitations, then, was this Eminent Domain Act adopted? The constitution of the Republic did not guarantee trial by jury in *all* cases:

Const., Art. 6, sec. 3.

Nor did it require trial by jury in condemnation proceedings:

Const., Art. 12.

And these constitutional provisions are transcripts of

the corresponding provisions in the Constitution of Kamehameha III, adopted December 6, 1852, and preserved in all succeeding Constitutions.

But in discussing the *ratio decidendi* of those authorities which, under Constitutions similar to that of the Republic, uniformly deny the right to a trial by jury, I endeavored to show the reasoning of the courts to be that, before any of those Constitutions were adopted, it had been the practice, in England and America, to ascertain the compensation to be paid for property taken for public use, by other agencies than a common law jury; that this practice was well known to the framers of those Constitutions; and that they did not intend, by any general language, to abrogate a practice so universal, and of such long standing, and against which no complaint existed.

2 Lewis, Em. Dom., sec. 311.
Murray vs. Hoboken Land Co., 59 U. S., 272.
Davidson vs. New Orleans, 96 Id., 97.

In other words, the judicially ascertained tribunal, at the enactment of the Constitution, is the proper tribunal.

Cruger vs. R. R., 12 N. Y., 198-200.

If, therefore, at the enactment of the Constitution of the Republic, which is itself a transcript of the Constitution of Kamehameha III, a jury was not the recognized tribunal, then it was erroneous to send the issues at bar to a jury for determination.

But the adoption of a constitutional or statutory provision from another jurisdiction involves and carries with it the adoption of the judicial interpretation placed upon it in the courts of its origin.

People vs. Coleman, 60 Am. Dec., 581.
Tel. Co. vs. State Board, 60 Am. Rep., 101.
Atty. Gen. vs. Brunst, 3 Wisc., 787.
Franklin vs. Twogood, 25 Iowa, 520.
Fritz vs. Kuhl, 51 N. J. L., 200.
People vs. Webb, 38 Cal., 477.
Sharon vs. Sharon, 67 Id., 189.
Lux vs. Haggin, 69 Id., 384.
Rouse vs. Donovan, 53 A. S. R., 457.
State vs. Chandler, Id., 483.
Laporte vs. Tel. Co., 58 Id., 359.
Cowhick vs. Shingle, 63 Id., 17.
Oleson vs. Wilson, Id., 639.
Ins. Co. vs. Lewin, 65 Id., 215.
Bell vs. Farwell, 68 Id., 194.
Ives vs. McNicholl, 69 Id., 780.
Stadler vs. Nat. Bank, 74 Id., 582.

And upon the same principle, the reason being much stronger, the repetition, in a later Constitution, of a provision of an earlier Constitution of the same country, is universally held to carry with it the same judicial con-

struction which was placed upon the provision while a part of the earlier Constitution.

Endlich, Interp. Stats., sec. 530.
Sutherland, Stat. Const., sec. 256.
Black, Interp. Laws, pp. 32-3, 369.
Compare, S. P. Logan vs. U. S., 144 U. S., 263; 36 L. Ed., 442.
People vs. Blodgett, 13 Mich., 147.
Saunders vs. St. Louis, etc., 97 Mo., 26.
Houseman vs. Com., 100 Pa. St., 222, 230.
Sharon vs. Sharon, 67 Cal., 189.
Lord vs. Dunster, 79 Id., 485.
People vs. Edwards, 93 Id., 158.
McBean vs. Fresno, 112 Id., 167-8.
Morton vs. Broderick, 118 Id., 483.

But the Supreme Court of Hawaii, in construing the provision of the Kamehameha Constitution, which was afterwards repeated and imported into the Constitution under which this Eminent Domain Act was enacted, distinctly determined that, in condemnation cases, a jury should not be permitted; and this doctrine has never been departed from:

Rooke vs. Nicholson, 1 Haw., 508.
Cited: Minister vs. Glover, 3 Id., 700, 701.
Swan vs. Colburn, 5 Id., 394.

A solemn adjudication of this character will be adhered

to by this Court, especially in view of the high regard in which such judgments are held.

U. S. vs. Engeman, 45 Fed. Rep., 546.
U. S. vs. Tennant, 93 Id., 613.
Olcott vs. Supervisors, 16 Wall., 678.
Taylor vs. Ypsilanti, 105 U. S., 72.
Louisiana vs. Pillsbury, 105 Id., 295.
Anderson vs. Santa Ana, 116 Id., 361.
Backus vs. Fort St. Co., 169 U. S., 557.
Brown vs. New Jersey, 175 Id., 172.
Wilkes vs. Coler, 180 Id., 506.
Shreve vs. Cheesman, 69 Fed. Rep., 790.
The "Robert Lewers" Case, 114 Id., 849.

In other words, the principle of *stare decisis* applies with special force to the construction of Constitutions, and an interpretation once deliberately put upon the provisions of such an instrument should not be departed from without the gravest reasons; and the settled construction put upon a Constitution by its own courts will be accepted as authentic by the courts of the United States.

Black, Interp. Laws, p. 34, 378 and cases cited.

But the Constitution of Hawaii reads: "only on due "process of law and just compensation."

Const. 1894: Republic: Art. 12.

Is trial by jury a part of "due process of law"? It would seem that it is not.

2 Lewis, ubi supra, sec. 365.
Murray vs. Hoboken Land Co., 59 U. S., 272.
Davidson vs. New Orleans, 96 Id., 97.

Trial by jury is not a part of due process of law.

10 Am. & Eng. Ency., 2d Ed., 305.
In re Meador, 1 Abb. (U. S.), 317.
In re Sing Lee, 54 Fed. Rep., 334.
Walker vs. Sauvinet, 92 U. S., 90.
Ex parte Wall, 107 Id., 265.
Hallinger vs. Davis, 146 Id., 314.

Doctrine of Rooke vs. Nicholson Amply Supported by Similar Adjudications Elsewhere:

Koppikus vs. State Cap. Com., 16 Cal., 249, 253-5; per Field, C. J.
Heyneman vs. Blake, 19 Id., 579, 596-7; per Field, C. J.
Steamboat Co. vs. Foster, 48 Am. Dec., 248, 257-260.
Sands vs. Kimbark, 27 N. Y., 147.
Backus vs. Lebanon, 11 N. H., 26-7; 35 Am. Dec., 466.
Hickox vs. Cleveland, 32 Am. Dec., 730, 733.
Beekman vs. R. R., 3 Paige, Ch., 45.

Scudder vs. Trenton Falls Co., 23 Am. Dec., 756, 764-8.

Byers vs. Com., 42 Pa. St., 89.

Construction of Hawaiian Eminent Domain Act.— There is not any question in this case as to the expediency of a jury trial; there is no question here of any discretion to allow such a trial. All questions of this character are foreclosed by the terms of a distinct statute; all considerations of this class are excluded by the operation of a statutory rule. This is not a case of expediency or discretion. It is a case of a statutory Court performing a statutory function; and by the statute, the Court is restrained and limited.

In approaching the construction of this Act, it is to be observed that, in the absence of a constitutional limitation, as in this case, the power of the legislature to establish the mode of procedure in cases of this class is unfettered.

Ogden vs. Saunders, 12 Wheat., 350, 354: Marshall, C. J.

1 Lewis, ubi supra, sec. 245.

Randolph, ubi supra, p. 288 and notes.

Lynch vs. Forbes, 161 Mass., 308.

Whiteman's Executrix vs. R. R., 33 Am. Dec., 420.

Lincoln vs. Colusa, 28 Cal., 666.

Kimball vs. Alameda, 46 Id., 23.

U. S. vs. Jones, 109 U. S., 513.

And from this it necessarily follows that, when the legislature shall have established its forms and modes of procedure, those forms and modes must be strictly adhered to, without extension or enlargement.

Authorities, supra.
Dorsey vs. Barry, 24 Cal., 453-4.
Lux vs. Haggin, 69 Id., 301.

The local legislature, acting pursuant to the Constitution that I have already commented upon, has deliberately adopted its form and mode of procedure in condemnation cases, and has incorporated that special procedure into this statute. The Court, I submit, must take this statute as it is written, without addition thereto or subtraction therefrom. It is to be tested by its own terms. Neither its terms, purpose nor meaning can be extended by implication or construction; and these principles of statutory construction are as old and as firmly settled as the law itself.

Reg. vs. Turk, 10 Q. B., 544: Denman, C. J.
Henderson vs. Sherbourne, 2 M. & W., 239: Tenterden & Abinger, J. J.
U. S. vs. Wiltberger, 5 Wheat., 95: Marshall, C. J.
Melody vs. Reab, 4 Mass., 473: Parsons, C. J.
Com. vs. Martin, 17 Id., 362: Parker, C. J.
Cleveland vs. Norton, 60 Id. (6 Cush.), 380: Shaw, C. J.
U. S. vs. Clayton, 2 Dillon, C. C., 224-6.

Anderson vs. R. R., 42 Minn., 490.
Ex parte McNulty, 77 Cal., 168.
Tynan vs. Walker, 35 Cal., 634.
Knox Co. vs. Martin, 68 Fed. Rep., 789.
City of Eureka vs. Dias, 89 Cal., 469-470.
Shreve vs. Cheesman, 69 Fed. Rep., 692.
Mills vs. Land Co., 97 Cal., 254.
In re Walkerly, 108 Id., 655.
In re Wong Hane, Id., 682.
R. R. vs. Phelps, 137 U. S., 536.
Cline vs. State, 36 Tex. App., 320.
Rich vs. Kaiser, 54 Pa. St., 86, 89.

The local Code of Procedure will be followed:

Bond vs. Dustin, 112 U. S., 604.
U. S. vs. Parker, 120 Id., 89.
Henderson vs. R. R., 123 Id., 61.

But Section 1552 provides that "The *Court* shall have "power to determine all adverse or conflicting claims to "the property sought to be condemned and to the com- "pensation or damages to be awarded for the taking of "the same."

Although the framers of this statute, like the framers of the Constitution under which it was adopted, were thoroughly familiar with the jury system, yet this statute is as silent as that Constitution concerning the use of juries in this class of cases. This statute is limited and confined to the "Court." It wholly fails to provide for

a jury, and by no canon of statutory construction may the word "jury" be read into it. It is the business of the Court, and its legitimate function, to interpret legislation, and every departure from the clear language of a statute is an assumption of legislative power by the Court. No Court possesses authority to supply the omissions of legislation.

Had the legislature wished to overturn the settled policy of Hawaii ever since it had a Constitution; had the legislature written into this section a requirement for a jury, as it could easily have done, as was done in the twenty States to which I referred, a different problem would have been presented; but the legislature did not see fit to insert that requirement into the statute; and its silence in this behalf is pregnant with significance; and it is submitted that it is not within the province of this Court to create a requirement for which the legislature saw no necessity.

But again: In construing the Hawaiian law of Eminent Domain, it may be treated as forming part of one consistent scheme of laws for the government of the community; and hence, the word "Court," as employed in Section 1552, may be explained, and its meaning ascertained and illustrated, by a resort to other sections in which that word is also used:

Black, Interp. Laws, p. 363.

Wilson vs. Donaldson, 10 A. S. R., 48; 117 Ind., 356.

St. Louis vs. Howard, 41 Id., 630.
Ferrari vs. Bd. Health, 5 So. (Fla.), 1.
Wortham vs. Basket, 99 N. C., 70.
State vs. Sloss, 3 So. (Ala.), 745.
State vs. Donnelly, 19 P. R. (Nev.), 680.
Gartner vs. Cohn, 51 N. J. L., 125.
In re Income Tax, 10 Haw., 317.

A comparative analysis of the various sections of the Civil and Penal Laws shows that the phrase, "the Court," as used in Civil Laws, Sec. 1552, was not intended to mean or include a jury, and was intended to mean the presiding Judge only. In these laws, the intrinsic opposition between the terms "Court" and "Jury" is very strongly marked; and the terms are employed to denote independent ideas.

Civil Laws, page 109, Section 199.
Civil Laws, page 125, Section 240.
Civil Laws, page 140, Section 272.
Civil Laws, page 142, Section 277.
Civil Laws, page 154, Section 315; compare these proceedings with Eminent Domain.
Civil Laws, page 164, Section 344, et seq.; compare Section 347.
Civil Laws, page 216, Section 491.
Civil Laws, page 254, Section 605.
Civil Laws, page 372, Sections 915-6.
Civil Laws, page 427, Section 1043.
Civil Laws, page 432, Section 1069.

Civil Laws, page 443, Sections 1095-9.

Civil Laws, page 485, Section 1221; Court and Judge synonymous.

Civil Laws, page 487, Section 1227; Court and Judge synonymous.

Civil Laws, page 492, Section 1244.

Civil Laws, page 493, Section 1246; Expressio unius exclusio alterius.

Civil Laws, page 493, Section 1247.

Civil Laws, page 494, Section 1252.

Civil Laws, page 496, Section 1260.

Civil Laws, page 497, Sections 1268-9, 1270.

Civil Laws, page 498, Section 1274.

Civil Laws, page 499, Section 1276; "Court *or* Jury": in opposition.

Civil Laws, page 499, Section 1277.

Civil Laws, page 514, Sections 1319, 1320.

Civil Laws, page 515, Sections 1322, 1325.

Civil Laws, page 517, Section 1328; "Court" and "Jury" opposed.

Civil Laws, page 518, Section 1331; "Court" and "Jury" opposed.

Civil Laws, page 520, Sections 1337-8; "Court" and "Jury" opposed, and see Section 1349.

Civil Laws, page 522, Section 1346; "Court" and "Jury" opposed.

Civil Laws, page 523, Section 1352; "Court" and "Jury" opposed.

Civil Laws, page 523, Section 1355; "Court" and "Jury" opposed: "Court" defined.

Civil Laws, pages 524-6, Section 1356; "Court" and "Jury" opposed: compare with Section 1362.

Civil Laws, page 553, Section 1442: "Court" and "Jury" opposed.

Civil Laws, page 555, Sections 1443-4; "Court" and "Jury" opposed: "Court," "Judge" and "Jury."

Civil Laws, page 590, Section 1530; suppose this suit brought by Hawaiian Government.

Civil Laws, page 602, Section 1565; suppose this suit brought by Hawaiian Government.

Civil Laws, page 613, Section 1609.

Civil Laws, page 615, Section 1616.

Civil Laws, page 667, Section 1777, et seq.; no jury here.

Civil Laws, page 684, Section 1820.

Civil Laws, page 786, Section 1.

Penal Laws.—Generally, throughout the Penal Laws, punishments are directed to be imposed by "the Court"; but this clearly does not mean that "a jury" is to assist in the exercise of this function.

Penal Laws, pages 212-3, Section 572: "Court or Jury."

Penal Laws, page 215, Section 576.

Penal Laws, page 228, Section 617; "Court" and "Jury" opposed.

Penal Laws, page 238, Section 648.

Penal Laws, page 239, Section 650; "Court" and "Jury" opposed.

Penal Laws, page 240, Section 652; "Court" and "Jury" opposed.

Penal Laws, page 240, Section 653; "Court" and "Jury" opposed.

Penal Laws, page 241, Section 655; "Court" and "Jury" opposed.

Penal Laws, page 242, Section 657; "Court" and "Jury" opposed.

Penal Laws, page 243, Section 662; "Court" and "Jury" opposed.

Penal Laws, page 244, Section 664; "Court" and "Jury" opposed.

Penal Laws, page 248, Section 675; "Court" and "Jury" opposed.

Penal Laws, page 249, Section 682; "Court" and "Jury" opposed.

Penal Laws, page 242, Section 661; "Court" and "Jury" opposed.

A California analogy:

Code Civ. Proc., sec. 297.

In re Wharton, 114 Cal., 370.

S. P.: Ex parte Wall, 107 U. S., 265.

Nor can defendants derive any comfort from the general language contained in Civil Laws, sections 1246, 1216, and 1232,—particularly section 1232.

Because: 1. Section 1232 is limited to parties plaintiff.

2. When read with section 1552, sec. 1232 establishes a general rule only, while Sec. 1552 establishes a special rule for this class of cases, and thus controls the situation:

Sutherland, Stat. Const., sec. 153, 157-8

3. Section 1552 being the later section both in position and in time, it necessarily controls.

Black, Interp. Laws, p. 363.
Sutherland, Stat. Const., sec. 158, note 3; sec. 160.
Bank vs. Patty, 16 Fed. Rep., 751.
Haritwen vs. The Louis Olsen, 52 Id., 652.

4. The object of the Eminent Domain Act is to establish a general scheme of procedure for this class of cases; when it speaks, its voice is controlling, and all other enactments must give way; and under the express terms of Section 1560, the ordinary procedure obtains only when Chap. 99 is silent; but by Sec. 1552, it is "otherwise expressly provided."

U. S. vs. Tynen, 11 Wall., 88.
U. S. vs. Claflin, 97 U. S., 546.
In re Neagle, 39 Fed. Rep., 855.

But again; trial by jury is further improper because

this Eminent Domain Act has provided an adequate remedy by submitting the assessment of damages to the Court; and this remedy is exclusive;

Gold vs. V. C. R. R., 19 Vt., 478; defining "Court."
Herring vs. Gulick, 5 Haw., 57.
Compare; Rhines vs. Clark, 51 Pa. St., 96.

But again; under this statute, there can be no delegation of judicial functions to a jury. The right of eminent domain is an attribute inherent in and necessary to sovereignty; and since all condemnation Statutes must be strictly pursued, it follows that where a sovereignty, by or through a legislative enactment, expressly designates a specific tribunal for condemnation cases, that tribunal alone has jurisdiction; it must hear and determine the case; it cannot delegate its functions to some other tribunal not named in the Act; and in this respect, as in all others, the Act must be strictly followed. In this Statute, the "Court" is the only tribunal named; in cases of this class, in the Hawaiian Islands, the term "Court" never has included "jury," local constitutional policy and judicial decision having uniformly rejected juries; and any delegation of the functions of the court to a jury would be unauthorized and would vitiate the validity of the entire proceeding.

Dorsey vs. Barry, 24 Cal., 453-4.
In re Buffalo, 139 N. Y., 422.

As to settled policy of the State and prior judicial decisions, see;

Waddell vs. Com., 84 Ky., 267.
Barbour vs. Louisville, 83 Id., 95.
Conant vs. Conant, 10 Cal., 252.
Ferris vs. Cooner, 11 Id., 176.
Knowles vs. Yates, 31 Id., 83.
Baltimore vs. State, 15 Md., 376.
State vs. Sorrell, 15 Ark., 664.
Maddox vs. Graham, 2 Metc. (Ky.) 56.

And finally, I may be permitted to add, in conclusion, that the local procedure in eminent domain cases has been sanctioned by Congress, not merely in the Act of 1888, but also in the Organic Act of the Territory. It has been observed that the power of eminent domain, being an incident of sovereignty, does not exist in any territorial government unless granted by Congress (1 Lewis, sec. 237); but, waiving for the present the question of Congressional grant, the limitations here suggested could stay the hands of the territorial government only, and could operate no restriction upon the general government. The general government proceeds under the Act of 1888; and that Act, after providing that land for public uses may be condemned by judicial process, after vesting jurisdiction in the circuit and district courts, and after maintaining a most significant and eloquent silence concerning trial by jury in this

class of cases,—a mode of trial which Congress could easily have written into the Act had it been believed proper,—then proceeds to provide in Section 2, as follows;

> "The practice, pleadings, forms and modes of pro-
> "ceedings in causes arising under the provisions of
> "this Act shall conform, as near as may be, to the
> "practice, pleadings, forms and proceedings exist-
> "ing at the time in like causes in the courts of
> "record of the State within which such circuit or
> "district courts are held, any rule of the court to
> "the contrary notwithstanding."
>
> Act of Aug. 1, 1888; 25 Stats. L., 357.

This Act which was intended by Congress to have some effective meaning and operation, was directed to all circuit and district courts wherever sitting; Congress understood perfectly that their jurisdiction, notably those of the ninth circuit, included territories; and by the terms of Sec. 86 of the Organic Act, the lower Court is placed upon an equivalent footing with all other circuit and district courts. And, indeed, it may be said that the local judicial system is unique and peculiar; it is assimilated to, and closely approximates, that of a fully developed state; and thus, upon various grounds, good reason exists why this general Act of 1888 should obtain here.

S. S. Co. vs. Hind, 108 Fed. Rep., 113. 116.

And when we turn to the Newlands Resolution, we find Congress indicating in the plainest way a set purpose to continue in force the local laws:

> "The municipal legislation of the Hawaiian Is-
> "lands * * * not inconsistent with this Resolu-
> "tion, nor contrary to the Constitution of the United
> "States * * * shall remain in force until the
> "Congress of the United States shall otherwise de-
> "termine."
>
> 30 U. S. Stats., 750.

But Congress has not "otherwise determined" in relation to this matter of jury trial in this class of cases; and the denial of a jury trial in cases of this class is not "contrary" to the "Constitution of the United States."

> "By the constitution of the United States, the
> "estimate of the just compensation for property
> "taken for the public use, under the right of eminent
> "domain, is not required to be made by a jury; but
> "may be intrusted by Congress to commissioner ap-
> "pointed by a court, or by the executive, or to an
> "inquest consisting of more or fewer men than an
> "ordinary jury."
>
> Per Gray, J., in Bauman vs. Ross, 167 U. S., 548 593.

"The constitution of the United States does not "forbid a trial of the question of the amount of com- "pensation before an ordinary common-law jury; "or require; on the other hand; that it must be be- "fore such a jury. * * * These are questions "of procedure which do not enter into or form the "basis of fundamental right. All that is essential "is that in some appropriate way before some prop- "erly constituted tribunal; inquiry shall be made as "to the amount of compensation; and when this has "been provided there is that due process of law "which is required by the Federal Constitution."

Per Brewer, J., in Backus vs. Fort St. Co., 169 U. S., 557, 569.

The Court sitting without a jury, is, however, a "properly constituted tribunal," and is an impartial one (2 Lewis, sec. 313); and there is nothing in our contention at all inconsistent either with the Newlands Resolution or with the Federal Constitution. In the Newlands Resolution Congress indicated its policy to continue in force the local laws, subject to certain qualifications which, we have seen, are irrelevant here; and when we turn to the Organic Act itself, we find Congress making those laws its own.

Organic Act, secs. 1, 5, 6, 7, 75, 81, 83, 86.

By force of these provisions, the local Eminent Do-

main Act becomes of equal dignity and binding power with the Organic Act, of which it is made a part; upon annexation, this Eminent Domain Act ceased to have any force, ex proprio vigore; the government which enacted it, ceased to be; the Act remained alive only through the will of Congress; and it became a regulation, an enactment, of Congress itself, and, like all Congressional enactments, drew its vitality from the will of Congress. The procedure which it establishes is, therefore, a procedure adopted by Congress; and as such, must be as strictly conformed to as if specially made the subject of a specific congressional enactment. Over the territories, Congress is supreme, under the constitution; its enactments in reference thereto, whether as general Organic Acts or as adopting local laws, particularly where the adoption is part and parcel of the Organic Act, are binding and obligatory on all alike; and "the "organic law of a territory takes the place of a constitu- "tion as the fundamental law of the local government."

National Bank vs. Yankton, 101 U. S., 129.

Mormon Church Case, 136 Id., 1.

Downs vs. Bidwell, 181 Id., 779.

"State Laws, when adopted by Congress, become "obligatory upon the Federal Courts."

Perkins vs. Watertown, 19 Fed. Cas., 255.

Cited: Jewett vs. Garrett, 47 Fed. Rep., 631.

And see:

23 Opinions Atty. Genl., 540.

In other words, I may invoke here the principle that where Congress, by statute, adopts a course of procedure, or legislates generally upon such subject-matter, such legislation must be followed; and even R. S., sec. 914 is not applicable to matters which are regulated by Congress (as these territorial matters are), or when Congress is silent, by methods derived from the common law, from ancient English statutes, or from the rules and practice of the courts of the United States.

McNutt vs. Bland, 2 How., 17.
Whitford vs. Clark, 119 U. S., 522.
Ex parte Iron Co., 128 Id., 544.

e Trial: Errors occurring during the trial.

At the outset, it should be remembered that it is the doctrine of the Supreme Court that error is presumptively injurious; and, in a recent decision, the rule was formulated that errors in the reception of evidence will be held to be material where it does not appear beyond doubt that they could not prejudice the rights of the party against whom the evidence was received.

This ruling was made as recently as 1893.

Mexia vs. Oliver, 148 U. S., 664.

Assignments of Error: 1, 3, 4, 7, 8, 9, 10, 13, 22, 25, 33.

These are kindred errors, and the record shows the grounds of the objections:

1. Immaterial, irrelevant and incompetent.

2. Not proper cross-examination, because not responsive to, or confined within, the examination in chief. Special illustrations will be found in Assignments of Error 1, 3, 4, 7. For example, notwithstanding that no inquiry was presented to Captain White concerning outside lands in any way, or concerning improvements upon outside lands, yet on cross-examination the investigation was permitted to overleap the limits fixed by the direct examination, and the defendant was permitted to go into matters from which the direct examination was studiously kept clear. This method of proving facts upon a closely contested trial cannot be supported.

Goddard vs. Crefield, Mills, 75 Fed. Rep., 818.
Houghton vs. Jones, 1 Wall., 702.
P. & T. R. R. vs. Stimpson, 14 Peters, 461.
Wills vs. Russell, 100 U. S., 621.
N. P. R. R. vs. Urlin, 158 U. S., 271.
McCrea vs. Parsons, 112 Fed. Rep., 99.

The Stimpson case, supra, is the leading case on this subject; and there, Mr. Justice Story observed:

"Now certainly these statements, if objected to by "the defendants, would have been inadmissible upon

"two distinct grounds: 1. First, as mere hearsay;
"2. And second, upon the broader principle, now
"well established, although sometimes lost sight of
"in our loose practice at trials, that a party has no
"right to cross-examine any witness except as to
"facts and circumstances connected with the mat-
"ter stated in his direct examination. If he wishes
"to examine him in other matters, he must do so
"by making the witness his own, and calling him,
"as such, in the subsequent progress of the cause."
14 Peters, 461.

And so here. The attention of the witness, on direct examination having been limited to the land in controversy, if the defendant "wishes to examine him in "other matters (as to other lands, or as to improvements "upon other lands), he must do so by making the witness "his own, and calling him, as such, in the subsequent "progress of the cause."

3. These errors involved inquiry into lands not involved in this case—outside lands; and clearly, the market value of the particular leasehold involved here cannot be enhanced by some improvement or advantage located elsewhere. And this objection gives additional point and force to the one just presented. Special illustrations of this line of error will be found in Assignments of Error 1, 3, 4, 8, 9, 10, 22.

The principle that the market value of the particular

property presently in litigation cannot be enhanced by some improvement or advantage located elsewhere, or diminished by some absence of improvement or disadvantage located elsewhere, has been applied by the Courts to cases of this class; and the principle is so well grounded in plain, common sense that probably but one or two illustrations will serve to make it plain. Thus, in a New York case, it was said:

> "The plaintiff sought to prove the evil effects of "the road in diminishing values by the process of "calling the owners of property in the vicinity and "proving, in each case, what the particular prem- "ises owned by the witness rented for before the "road was built and what thereafter. There were " objections and exceptions. Such a process is not "permissible. Each piece of evidence raised a col- "lateral issue (Gough vs. Roberts, 53 N. Y., 619), and "left the Court to try a dozen issues over as many "separate parcels of property. We have held such "a mode of proof to be inadmissible. (Huntington "vs. Attrill, 118 N. Y., 365; in re Thompson, 127 N. "Y., 463). The elevated railroad cases in this Court, "to which the plaintiff refers us, give no warrant "for such a mode of proof, but indicate that the gen- "eral course and current of values must be shown "by persons competent to speak, leaving to a cross- "examination any inquiry into specific instances if

"such be deemed essential. Almost all the evidence "of depreciation was of the erroneous character, *and* "*we cannot say that it may not have worked harm* "*to the defendant.*"

Jamieson vs. Elevated Railway, 147 N. Y., 325.

It is no more legitimate to seek to enhance the market value of the property in controversy by some improvement or advantage located elsewhere, than it is to diminish the market value of the property in controversy by some absence of improvement, disadvantage, or other "evil effect" located elsewhere; in either case a purely collateral issue is raised involving extrinsic questions and innumerable and interminable matters wholly foreign to the real issue in the case. But here, the defendant, against the objection and exception of the petitioner, was permitted to show that the Honolulu Plantation Company had a mill belonging to the plantation "in the vicinity" of the land in controversy (Assignment of Error 1); and to show what was the size of that mill (Assignment of Error 3); and after calling attention to the pumping plant of the company and its water supply in Halawa Valley, thoroughly effective for counsel's purposes, though ruled out—to show the distance of Halawa Valley from the land in question (Assignment of Error 4). Nor was this all. When Archer was on the stand the established rule of cross-examination was again violated, and again an attempt was made to ignore the actual condition of

the land in controversy on July 6th, 1901, and to swell its value by showing facilities, improvements, or advantages elsewhere, by showing that the Plantation Company had a water supply "immediately available" to the land in question, and that the pumps at Halawa Valley would pump, as to one of them, about 10,000,000 gallons, while the other would pump 7,000,000 gallons more or less (Assignment of Error, 7, 8, 9). This episode is remarkable for two things; first, because the Government persistently claimed that it was "dealing only "with the exact condition of the land on July 6th; if "they can show anything that was actually on the land "at that date, there would be no objection to it," and repeatedly objected that these excursions into outside lands were improper (Record p. 172, 587). And in the second place, because the same page of the Record (p. 172, 587) shows expressions by the Court directly in line with the objection now made against the sustaining of this verdict; thus, the Court remarked: "It is not proper "cross-examination; it is of a distant piece of land; "* * * If you get to wandering away from the value "of this land, you will be in a field of uncertainty." But notwithstanding this, notwithstanding that the attention of the witness had not been directed to this subject-matter on his direct examination, notwithstanding that the actual condition of the land in controversy on July 6th, 1901, did not include this water supply that was on a "distant piece of land," and notwithstanding

that it was sought to swell the value of this barren waste by proving an improvement situated on "a distant piece of land," yet, against the objection and exception of the Government, this injurious testimony was permitted to be spread before the Jury. The expression "im-"mediately available" conveys no definite meaning; it does not state a fact; it is merely the conclusion, or individual judgment of the witness; and was reprehensible to the last degree. The rule that witnesses must state facts, and not conclusions, is an elementary one. If there be a rule well established in the law of evidence, it is that a witness should be confined to facts, leaving the conclusion to be drawn from those facts to the jury. The function of the witness was to state what he actually observed; but it is no part of that function for the witness to formulate for the jury a conclusion upon the facts which he observed or to which he testified. It is clearly not the province of a witness to act as judge or jury—to invade the province of the jury, or to substitute his conclusion for that of the jury; and it is against recognized principles to address questions to a witness which are so framed as to call upon him to determine controverted issues of fact, or to pass upon the effect of a series of facts. Thus, it would obviously be improper to ask a witness to state his conclusion upon the testimony in the case relating to any given question; because in such an instance, the witness is in effect asked to decide the merits of the case, which is a

duty wholly beyond his province; and no rule of law authorizes the usurpation by the witness of the province of the jury by drawing those conclusions of fact upon which the decision of the case depends. It is for the jury alone to draw conclusions and inferences from the facts proved; it is not for a witness to arrogate to himself the functions of witness, jury and judge, or to invade the legitimate province of the real triers of the facts.

In other words, there is no principle of the law of evidence, with which I am familiar, which justifies the admissibility of the impressions and conclusions of the witness. Thus, as observed in People vs. Sharp, infra, an exceedingly well considered case, "the opinion, the "thought, the understanding of the witness, is not evi- "dence." And this same idea has found expression in innumerable decisions of respectable courts. Thus, that a meeting was "disturbed" is incompetent (Morris vs. The State, 94 Ala. 457); that a contract has been "abandoned" is incompetent (R. R. vs. Woodworth, 8 So. (Fla.) 177); that goods were "accepted" is incompetent (Brewer vs. R. R., 107 Mass., 277); that possession was "adverse" is incompetent (Arents vs. R. R., 156 N. Y., 1); that an act was within an agent's "authority" is incompetent (Benninghoff vs. Ins. Co., 93 N. Y., 500; Green vs. R. R., 35 Am. Rep. 370); whether a party "assented" to a settlement, is likewise incompetent (Stanton vs. Crispell, 9 Hun, 502); that a house was in "good

repair" is incompetent (McMann vs. Dubuque, 107 Iowa, 62); whether one is a man of "financial ability," or "responsibility," or "solvency," or "insolvency," is incompetent (Thompson vs. Hall, 45 Barb., 216; Denman vs. Campbell, 7 Hun, 88; York vs. People, 31 Hun, 446: Hahn vs. Penney, 60 Minn., 487; Agnew vs. U. S., 165 U. S., 36); whether another had "knowledge" is incompetent (Bailey vs. State, 107 Ala., 151; McCouster vs. Banks, 84 Md., 292); that certain articles are "necessary" is incompetent (Poock vs. Miller, 1 Hilt., 108; Tolles vs. Wood, 99 N. Y., 616); whether one engine discharged more sparks than another is incompetent (Collins vs. R. R., 109 N. Y., 243); whether a person "has "done as agreed," is incompetent (Nichols vs. White, 41 Hun, 152; Clark vs. Ryan, 95 Ala., 406); and see further in support of this principle:

Watrous vs. Morrison, 33 Fla., 261.
State vs. Porter, 52 Pac. Rep., 175.
Linihan vs. State, 22 So. (Ala.), 662.
Raney vs. State, 45 S. W. (Tex.) 489.
Murray vs. R. R., 52 P. R. (Utah), 596.
People vs. Fogolson, 74 N. W., (Mich.), 730.
People vs. Sharp, 107 N. Y., 427.
Tillery vs. State, 24 Tex. App., 251.
Brinkley vs. State, 89 Ala., 34.
Largan vs. R. R., 40 Cal., 272.
Tait vs. Hall, 71 Id., 149.

People vs. Reed, 52 P. R. (Cal.), 835.
People vs. Elliott, 119 Cal., 593.

The double viciousness of this line of examination may be aptly illustrated by Assignment of Error 10; doubly vicious, first because seeking to fix the value of the land in controversy by some improvement or advantage located elsewhere; and secondly, because calling for the conclusion of the witness upon a litigated issue of fact. Not only was the question incompetent, but the witness was allowed to answer it, and to answer it affirmatively; and to answer it affirmatively without explaining what was meant by the phrase "within the lines of the Honolulu Plantation Company"; and for anything that appeared to the contrary, "the "lines of the Honolulu Plantation Company" might have extended for an indefinite distance. It appeared, later, in the testimony of Low, that this Plantation included about 8000 acres within "the lines of the Honolulu "Plantation Company" (Record, pp. 246, 253, 625-6); and it also appeared, later, from the testimony of this same witness, that "the lines of the Honolulu Plantation "Company" extended two and one-half miles on one side of the land in controversy, and five miles on the other side (Record, pp. 253, 626). For anything, then that appeared from the testimony in the case, we are confronted with the erroneous and injurious proposition that a flowing stream anywhere within 8000 acres,

or within two and one-half miles one way or five miles the other way, is "immediately available" to the land in controversy, no matter what may be the topography of the country, no matter what natural obstacles, impediments, or barriers may intervene.

And again, in Assignment of Error, 22, we have a repetition of all the vices of this ruling. Here the witness Low was asked to describe the nature and quality of the soil of the land sought to be condemned (Record, pp. 283-4, 633-4); in answering this question, he ceased to be responsive, and undertook to establish a comparison with certain outside and distant soil, by testifying, "we have similar soil in the Halawa Valley that we "have raised cane on"; but the protestation of the petitioner against this species of testimony was overruled, and the objectionable matter allowed to go to the jury, notwithstanding that "there is no general or well de- "fined principle of the law of evidence that enables a "party to establish the value of some particular or "specific thing by proof of the value of another thing "of the same class or general character," and notwithstanding the repeated and continuous objections of the petitioner to this class of testimony.

The most complete discussion of the point upon which I am insisting, will be found in a very recent and well considered case in the Court of Appeals of New York. There, the Court said:

"These views would be quite sufficient to dispose "of the appeal, and the discussion could properly "end here except for the fact that the learned coun- "sel for the plaintiffs has submitted quite an elabor- "ate argument with numerous citations of authori- "ties to show that the rule laid down in the Jamie- "son Case was a departure from correct principles "and from the doctrines sanctioned by previous de- "cisions of this court. In that case it was decided "that in cases of this character it is not permissi- "ble to call witnesses who owned property in the "vicinity of that involved in the suit, to show what "their premises rented for before and after the con- "struction of the railway, in order to affect the ques- "tion of damages to the property there in question. "The principle upon which the decision rests is that "such a rule, if sanctioned, would introduce into "the case collateral issues relating to each sepa- "rate parcel of property. *There is no general or "well-defined principle of the law of evidence that "enables a party to establish the value of some "particular or specific thing by proof of the value "of another thing of the same class or general "character.* It would scarcely be claimed that in "a controversy concerning the value of a horse "such value could be established by proof of the "value of another horse that bore more or less re- "semblance, or possessed some or all of the quali-

"ties of the one in question, according to the vary-
"ing notions of witnesses. A party upon whom the
"burden rests of proving the value of particular
"property, real or personal, must ordinarily con-
"fine the proof to the specific property in contro-
"versy. Cases may doubtless be found where, in
"other jurisdictions and in special statutory pro-
"ceedings for determining the value of real prop-
"erty, more or less support is given to the conten-
"tion of the plaintiff's counsel. But in most, if not
"all, of them it will be found that the inquiry was
"not governed by the rules of evidence that pre-
"vail at common law. There are many cases in
"which commissioners or other officers specially au-
"thorized to determine the value of real estate may
"act upon a personal view or examination of the
"property and generally upon other than the strict
"rules of evidence that have been established in
"courts of law and equity. Such cases have little,
"if any, bearing upon the question decided in the
"Jamieson case. Our attention has also been call-
"ed to cases in this court belonging to the same class
"of actions as this, where proof of the value of
"other and similar property, in the same locality,
"has been recognized as proper.

"It will be found, we think, upon careful exam-
"ination, that in most of these cases the court
"simply recognized a situation which the parties

"themselves had created by the general course of "the trial, or by consent or acquiescence and hence "they are in no way in conflict with the decision "in the case referred to. Evidence of this charac- "ter has, it is well known, been given by both par- "ties in this class of actions, and when we have found "it in the record, generally without objection, we "have treated it as the parties themselves treated it "at the trial, and have in that way recognized it, "when taken in connection with other proofs, as en- "titled to consideration in order to support a find- "ing or to answer some view of the case, taken for "the first time in this court, contrary to the gen- "eral course of the trial. This court does not re- "fuse to recognize facts determined at the trial, "though some part of the testimony tending to "prove them may have been, in its nature, incom- "petent for that purpose, and under a proper ob- "jection should have been excluded.

"The party complaining must raise the question "as to the quality or competency of the proof be- "fore the fact is found or the question decided and "not afterwards. In the other cases in this court "cited by the learned counsel for the plaintiffs, "proof of this character, found in the record, was "not regarded, under all the circumstances, as suffi- "ciently material to warrant a reversal. It was of "more importance as affecting the result than it

"appears to be in the case at bar. In the Jamieson "Case the question was sharply raised at the prop- "er time by a proper objection and exception and "the evidence thus received was substantially all "that could be found in the record to sustain the "finding. Our decision in that case did not, we "think, introduce any new rule of evidence or modi- "fy any principle that had been directly sanctioned "by prior decisions. It is not apparent how the "practice which was there condemned, if sanc- "tioned as a rule of evidence, can be of any great "value in this class of actions. *The extent of the "investigation would be subject to no limits ex- "cept such as might be prescribed by the discre- "tion of the trial court, and even when it could be "shown that the property was substantially similar "as to locality and physical surroundings, yet dif- "ferent parcels of property are affected in their "value by so many different causes, that in the end "there must be left a wide field for conjecture and "speculation.* The scope of the inquiry would be- "enlarged beyond all necessary or proper limits and "the mind of court and jury confused with a multi- "tude of conflicting and irrelevant facts. There is "no such inherent difficulty in proving the value "of real estate at a given time, as to require a re- "sort to such evidence. It may be proved by show- "ing the amount of its income to the owner, the

"general course of values, by the opinions of wit-
"nesses competent to judge, or by that of experts
"having special knowledge on the subject and fa-
"miliar with the causes which affect its rise or de-
"cline in the market. When the parties have given
"all proof on the subject which has long been rec-
"ognized as competent, for the purpose of ascer-
"taining the value of the property, it will generally
"be found that little, if anything, of any value, can
"be added by resorting to proof of the value of
"other property."

Witmark vs. R. R., 149 N. Y., 393, 398-401.
In re Thompson, 127 Id., 463.

But this vice of bringing in outside, collateral and irrelevant matters, together with the injury that it does, is aptly illustrated by a case in the same court. There, the court said:

"A witness on the part of the plaintiff, was asked
"this question: 'Do you know anything about a par-
"'ty recovering a judgment of $5,000, before Judge
"'Van Brunt?' This was objected to, the objec-
"tion was overruled, and an exception taken. The
"witness answered, 'I was not in that case, nor a
"'witness, and don't know anything about it; I
"'did hear from some parties outside that there
"'was such a thing.' It is evident from the pre-

"vious questions put to the witness, that this in-
"quiry was intended to refer to a judgment for an
"injury occurring at the same place. The question
"was clearly incompetent. It was not a relevant
"or pertinent fact upon any issues in this case, and
"was calculated to influence the jury injuriously to
"the defendant. What the facts of the other case
"were, could not be known, and if they were, could
"not legitimately affect the case on trial, while if
"the jury were informed that in another case a
"judgment of $5,000 had been rendered for the
"plaintiff, it might have affected their judgment,
"either upon the litigated questions of negligence
"or as to the amount of the verdict. * * *
"*Jury trials should be strictly confined to the is-*
"*sues made, and to the legitimate facts bearing*
"*upon them, and the practice of dragging in ex-*
"*traneous matters to influence the jury cannot be*
"*too strongly condemned. Upon a closely contest-*
"*ed question of fact, slight influences may turn the*
"*scale, and every rule of propriety and justice de-*
"*mand that nothing outside of the legitimate facts*
"*should be introduced to affect the minds of those*
"*who are to decide the question.* It is not in-
"tended to intimate an opinion that this case was
"not properly decided by the jury either upon the
"question of negligence, or as to the amount of the
"verdict, but the fact that some other person had

"recovered a verdict for a similar injury, was not "a proper subject of inquiry on this trial, *and we "cannot see that it had no influence upon the jury, "we think it was error.*"

O'Hagen vs. Dillon, 76 N. Y., 171-3.

To the same effect: Jamieson vs. Elevated Railway, 147 Id., 325.

4. The errors enumerated above are also open to another objection, namely, that this excursion into outside lands was incompetent for the reason that the evidence should have been restricted to exhibiting the actual condition of the land involved on July 6th, 1901; and as illustrations of this point, I refer the Court more particularly to Assignments of Error, 7, 8.

That the evidence must be restricted to the issue, that it must be confined to the allegations (Gentry vs. U. S., 101 Fed. Rep., 51), that it must exhibit the actual condition of the precise property involved at the time of the taking, and that it must not stray off into a collateral examination of other properties, are propositions thoroughly supported by the authorities. Randolph tells us that the property to be condemned "is to be "valued as it stands" (Em. Dom., sec. 238); and Lewis says that the "proof must be limited to showing the "present condition of the property, and the uses to "which it is naturally adapted, * * * and generally "remote and speculative inquiries should be excluded"

(2 Lewis, Em. Dom., sec. 480); and this proposition is so thoroughly settled in the law of Eminent Domain, that I shall take time to cite but one of the adjudicated cases bearing on the matter:

> "The damages must be measured by the market "value of the land at the time it was taken; not its "value to the petitioners, nor to the respondent; "not the value which it might have under different "circumstances from those then existing."
>
> Moulton vs. N. Water Co., 137 Mass., 167.

5. The objectionable matter contained in the Errors above enumerated, was also erroneous, because the yields of these outside lands were immaterial, it not appearing that there was any identity of quality between them and the land in controversy, or that the land in controversy ever had any yield—thus rendering comparison impossible, because speculative. Special illustrations of this vice will be found in the Assignments of Error, 13, 22, 25. The testimony of Low, protested against in Assignment of Error 22, is objectionable upon other grounds hereinabove adverted to, but, like many more of these errors, it is objectionable on this ground also—though indeed the same may be said of Assignment of Error 25.

It should however, never be overlooked that the one-fourteenth of this defendant's 8000 acres involved here

is raw, undeveloped, and untested land; it has never raised a crop of cane; it has never produced a dollar of income; its capacity was wholly an unknown quantity; and its capabilities are matters purely of guess and speculation. The speculative and uncertain nature of sugar lands is common knowledge; their dissimilarity, within restricted areas, was confessed in this case; and Low's own handwriting in Exhibit 14 (supra) fully illustrates this dissimilarity, and shows how, within the very contracted area involved here, nearly one-half is useless and unfit for cultivation. Hence, the folly of attempting to reason from one piece of land to another in the absence of clear and affirmative proof of identity of quality; and hence, too, in a jury trial, the grave injury resulting from permitting speculative dreams to be imported into the case to befog, mislead and prejudice the jurors,—for "even when it could be shown that the "property was substantially similar as to locality and "physical surroundings, yet different parcels of prop-"erty are affected in their value by so many different "causes, that in the end there must be left a wide field "for conjecture and speculation. The scope of the in-"quiry would be enlarged beyond all necessary or prop-"er limits and the mind of court and jury confused with "a multitude of conflicting and irrelevant facts."

Witmark vs. R. R., 149 N. Y., 400.

6. The last exception of those in this class above

enumerated, namely, Assignment of Error 33, was well taken. It is everywhere agreed that the redirect examination is limited by the cross-examination, just as the cross-examination is limited by the direct examination.

Dutton vs. Woodman, 57 Am. Dec., 46.
Blake vs. Stump, 20 Atl. (Md.), 788.
Backus vs. Barber, 77 N. W. (Minn.), 959.
State vs. Ussery, 118 N. Car., 1177.
Robinson vs. P. P. & W. Co., 31 P. R. (Okla.), 988.
Bank vs. Saling, 33 Oreg., 394.
Ranney vs. R. R., 67 Vt., 594.
Fry vs. Leslie, 12 S. E. (Va.), 671.
Schaser vs. State, 36 Wisc., 429.

7. Before leaving this class of errors, it is proper to point out that the error complained of in Assignment of Error 7, cannot be excused. A litigant must state the grounds of his objection, if his exception is to be of benefit; and a failure of the court to permit it deprives him of the essential right to have his cause heard upon legal evidence only.

Tabor vs. Bank, 62 Fed. Rep., 383.
Sigafus vs. Porter, 84 Fed. Rep., 435-6; grounds of objection.
Laber vs. Cooper, 7 Wall., 565; objection must be made at trial.

N. H. Co. vs. Pace, 158 U. S., 36; necessity of exception.

Assignment of Error 5.—This was a double question, which, of course, was not good practice. If either question had been asked, a specific objection could have been made; to the first that it had no foundation in that it did not appear that the witness knew how the return was made up; and to the second, that the return itself was the best evidence of what kind of return it was, thus eliminating the conclusion of the witness as to the law. This double question "called for the in-"formation which from any source might be in the pos-"session of the witness, and not for his knowledge. An "answer detailing the hearsay statements of others, "whether verbal or in writing, made at any time or "place would have been responsive."

Xenia Bank vs. Stewart, 114 U. S., 224, 232.

Other errors similar to Assignment of Error 5 are Assignments of Error 17, 18, 24; and a striking illustration may be found in Assignment of Error 18. The witness having testified that no sugar had been grown on the land in controversy by the Honolulu Plantation Company, counsel asks him "why not?" Such a question as this always elicits a mass of detrimental testimony by which the opposing party cannot be bound: What concern had the United States with the reasons

of the Honolulu Plantation Company for not planting sugar upon this land? The reasons and conclusions of the Honolulu Plantation Company upon that subject are not testimony by which the United States could be bound. The private reasons of the Company nourished *in petto* and uncommunicated to the Government were not testimony. The mental processes of this company, of its Directors or Manager, were not testimony. If the word "testimony" had any rational meaning, that meaning must involve acts and speech,—things done and things uttered; and if a narration of things which have been done, or of words which have been uttered, is asked for, the question will bear broadly upon its face its title or want of title to be regarded as permissible. But to ask a witness why he did a particular thing, or why he did not do a particular thing, is not to ask for testimony, and is calculated only to elicit the narrator's subterranean springs of action, with which his opponent is not concerned, and by which he cannot be bound. As the highest court in Pennsylvania has well remarked: "the thoughts of one party cannot be proved to bind "the other."

Thomas vs. Loose, 114 Pa. St., 35.

In other words, witnesses must state not merely facts, but those facts which are in themselves legal evidence,—not conclusions, not private reasons, not secret, uncommunicated motives of action or non-action. To adopt

the language of the Supreme Court heretofore quoted this objectionable question "called for the information "which from any source might be in the possession of "the witness, and not for his knowledge. An answer "detailing the hearsay statements of others, whether "verbal or in writing, made at any time or place, would "have been responsive."

Xenia Bank vs. Stewart, 114 U. S., 224, 232.

This is precisely what was done here,—a proceeding which, I submit, was manifestly erroneous, and a violation of a rule repeatedly announced.

People vs. Simonds, 19 Cal., 275.
People vs. Griffin, 52 Id., 616.
Wheless vs. Rhodes, 70 Ala., 419.
People vs. Gonsales, 71 Cal., 569.
Woods vs. Whitney, 42 Id., 358.
Burns vs. Campbell, 71 Ala., 271.
People vs. Powell, 87 Cal., 349.
People vs. Wallace, 89 Id., 158.
McCormack vs. Joseph, 77 Ala., 236.
Brown vs. Hickey, 68 Iowa, 330.
Stuart vs. Whitlock, 58 Cal., 2.
McDonald vs. Jacobs, 77 Ala., 524.
Herring vs. Skaggs, 34 Am. Rep., 4.
Williams vs. State, 26 So. Rep., 521.
People vs. Sharp, 107 N. Y., 427.

Assignments of Error 6, 12, 31, 35.—These errors involve mere speculation and possibility as to the productive capacity of a tract of land which never had been sowed or cropped,—which never had produced anything whatever; and the view taken by Mr. Lewis negatives the propriety of this testimony:

2 Lewis, sec. 480.

At best, this land, as to the leasehold interest therein, should only be valued in a general way as possible sugar land; but its estimated productive capacity is incompetent, because involving such uncertain and speculative elements as the number of tons, the cost of production, fluctuating atmospheric conditions, uncertain rain-fall, the uncertainties of the labor market, the well-known fluctuations of the sugar market, and the industry, skill, etc., of the operator of the plantation. These elements are entirely too dependent upon personal and accidental considerations to be taken into account; and it is submitted that no evidence should have been received as competent which was a mere speculation upon the probable or imaginary productiveness of property which confessedly had never raised a crop.

Searle vs. R. R., 33 Pa. St., 63-4.
R. R. vs. Balthaser, 119 Id., 482-3; approved in
S. D. L. Co. vs. Neale, 78 Cal., 63.
Doud vs. R. R., 76 Iowa, 438.

R. R. vs. Worcester, 155 Mass. 35.
R. R. vs. Galgiani, 49 Cal., 139.
De Boul vs. R. R., 111 Ill., 499.
In re R. R., 35 Hun., 633.
Cobb vs. Boston, 109 Mass., 438.
Maynard vs. N. Ham., 157 Id., 218.
Ranlet vs. R. R., 62 N. Ham., 561.
R. R. vs. Patterson, 107 Pa. St., 461.
Miller vs. Water Co., 148 Id., 439.
R. R. vs. R. R., 12 Cush., 605.
Whitman vs. R. R., 3 Allen, 133.
Minister of Finance vs. Castle, 8 Haw., 106.
Lihue Plant. Co. vs. Farley, 13 Id., 284.

The Hawaiian cases above cited fully illustrate the uncertain and problematic character of these plantation enterprises. Thus, in Minister of Finance vs. Castle, supra, the Court, speaking of "an agreement that in "lieu of rent for the demised premises the lessor shall "be paid one-twenty-fifth of all proceeds of all sugars or "other produce raised on said lands after deducting cer- "tain specified expenses and charges", said:

> "As to the second matter, to try and fix the "stamp duty on such an agreement for rent would "only be working in the dark and guess work— "there is nothing certain; all would have to de- "pend on the state of the market, state of the "crops, state of the weather and many other con-

"tingencies, which it is impossible for human abil-
"ity to ascertain with any certainty."

The impossibility of procuring any but the most speculative and uncertain estimates in cases of this class, is further indicated by the following remark of the Chief Justice in Lihue Plantation Co., vs. Farley, supra:

"It is exceedingly difficult to value property of
"this kind—especially when, as in this instance,
"no sales of stock in the company have taken place
"for some years. Many things besides such facts
"as are set forth above are to be considered. Some
"of these bear on general conditions such as the
"political status of the Islands, which have since
"the last decision been annexed to the United
"States, the assurance that our sugars will not be
"liable to customs duties, the prospects in regard
"to the supply of labor, the money market, and
"other things which affect values generally. But,
"after all, it is impossible to accurately estimate
"the value, or to reason it out with a fair degree
"of certainty. In a case of this kind different per-
"sons, though the most expert in such matters,
"would vary greatly in their opinions—even to the
"extent of hundreds of thousands of dollars."

And the same idea recurs in a typical case,—typical,

that is to say, of the general doctrine upon this subject:

> "The fact to be ascertained was the value of the "land at the time of the taking. It is not allowed "to arrive at this fact by the proof of the annual "net profits derived from a particular use. The "profit for any year would depend upon many and "varying circumstances, such as the nature of the "season, the price of labor, the condition of the mar-"ket as to supply and demand in respect to the "particular product, etc. The valuation derived "from such evidence would be conjectural and specu-"lative, and would not form a proper basis for an "estimate of damages."

S. & C. R. R. Co. vs. Galgiani, 49 Cal., 140.

Assignments of Error 11, 19, 20, 21, 23, 36.—These errors result from the admission of evidence which did not call for the market value but merely for the special, peculiar and limited value of the property to a particular individual, namely, the Company defendant; in other words, this illegitimate evidence elicited individual or personal ideas or conceptions of value, as distinguished from market value. The impersonal character of market value was entirely overlooked, and market value was confused with the personality or needs of the Plantation defendant. This type of evidence is

everywhere reprobated; and all the authorities agree that the compensation is to be measured by the impersonal rule of market value, and not by the personal needs or private valuations of the owner.

This theory of the law, that market value is a purely impersonal element quite distinguishable from the personality or personal views of the owner of the property, is approved by the Supreme Court in the following language:

> "In determining the value of land appropriated "for public purposes, the same considerations are "to be regarded as in a sale of property between "private parties. *The inquiry in such cases must "be what is the property worth in the market,* "viewed not merely with reference to the uses to "which it is at the time applied, but with reference "to the uses to which it is plainly adapted; that is "to say what it is worth from its availability for "valuable uses. Property is not to be deemed "worthless because the owner allows it to go to "waste, or to be regarded as valueless because he "is unable to put it to any use. Others may be "able to use it, and make it subserve the necessities "or conveniences of life. Its capability of being "made thus available gives it a market value which "can be readily estimated."
>
> Boom Co. vs. Patterson, 98 U. S., 403.

The phrase "market value" is defined in the Am. & Eng. Encyclopaedia of Law, to be a "price established "by *public sales in the way of ordinary business*"; and the authorities collected in the accompanying note are themselves, as well as the definition itself, entirely inconsistent with the theory upon which the objectionable evidence was admitted;—entirely inconsistent, that is to say, with the idea that market value is to measured by the peculiar personality or private needs of the owner of the property taken.

19 Ency. Law, 2nd Ed., 1153.

Mr. Randolph, with his customary clarity of vision, puts the matter thus:

> "The most important and often the only step in "the assessment of compensation, is the determ- "ination of the market value of the property af- "fected. This value is presumably its present "worth in cash. The market value of property is "not affected by the personality or needs of its "owner. The property is not to be valued in the "light of any convenience or association which may "make it peculiarly desirable to the possessor, but "solely with regard to the elements which would "make up its worth to any person happening to own "it.
>
> "The impersonal quality of market value is fur-

"ther illustrated by the rule which forbids con-
"sideration of the necessities of the expropriators,
"or the probable value of the property under their
"management."

Randolph Em. Dom., sec. 234.

And Mr. Lewis, in formulating the general principles to be applied in estimating value, disposes of the matter as follows:

"In estimating the value of property taken for
"public use it is the market value of the property
"which is to be considered. * * * It is not a
"question of the value of the property to the owner.
"Nor can the damage be enhanced by his unwilling-
"ness to sell."

2 Lewis, Em. Dom., sec. 478.

And the rule of market value is fully recognized in this Circuit:

"You will understand, gentleman, that it is your
"duty to assess the damages in this case at the
"market value of the land. The testimony is di-
"rected to that question."

Per Morrow, Circuit Judge; Charge to Jury in U. S. vs. Spring W. W., No. 12908. Charge filed Jan. 14, 1901.

But here, Archer, against the objection and exception of the Government, was permitted to take into consideration "the whole property of the Honolulu Plan-"tation Company that is available for use in connec-"tion with that land" (Assignment of Error 11); and although the question was incompetent as traveling beyond the issue yet it was also an incompetent hypothetical question in that, ignoring the market value, it dragged in the personal equation of the defendant. The testimony of Bolte, admitted against the objection and exception of the Government, was directly in the teeth of all the authorities (Assignments of Error 19, 20). He was permitted to testify immediately and directly, not to the market value of the leasehold interest involved, but to "the value of the leasehold interest of that land "on the 6th day of July, 1901, to the Honolulu Planta-"tion Company"; and his unusual estimate of "$450,000" is reflected in the absurd verdict of this jury. And this was done in the face of the objection that "it is settled "law that what this may be worth to the Honolulu Plan-"tation Company is not a fair test of the market value" (Record, p. 628-9).

When Low was on the stand, and inquiry was made of him concerning the buildings upon the property, he gave the value of those buildings "to this Company"; the Government, in moving to strike out this illegal matter again directed the attention of the court to the

point involved by remarking: "It is perfectly apparent "from the testimony that it makes no attempt to reach "the market value. * * * It is illegitimate, the "value it may be to any particular individual as dis- "tinguished from the market value." (Record, p. 633.)

This same injurious error again appeared during the testimony of Low upon the only vital issue in the case, namely, that of the value of the property involved. The occurrences are thus detailed in the Record:

"Mr. SILLIMAN. Q. Mr. Low, what is the val- "ue of the property sought to be condemned to the "Honolulu Plantation Company?

"Mr. DUNNE. I object to the question upon two "grounds; first, on the ground that it does not seek "to bring forth market value and upon the ground "second that it seeks to limit the value therein "spoken of to the individuals, to wit: the Honolulu "Plantation Company as distinguished from market "value.

"The COURT. Let him answer the question.

"A. Four hundred thousand dollars.

"Mr. SILLIMAN. What was its value on the "6th of July, 1901?

"A. To the Honolulu Plantation Company?

"Q. Yes, sir.

"Mr. DUNNE. The same objection.

"The COURT. The same ruling.

"Mr. DUNNE. We except.

"A. Four hundred thousand dollars."

(Record, pp. 635-6.)

And even when Higby was testifying concerning buildings, the same error recurred,—the same failure to discriminate between market value upon the one hand, and individual or personal value upon the other (Assignment of Error 36).

It is confidently submitted that these rulings cannot be sustained upon any theory known to the law of Eminent Domain. The principles deducible from the authorities hereinabove cited under this head, stamp these rulings as fatal and reversible error; for there can be no middle ground between the universally accepted criterion of market value, upon the one hand, and the personal needs of an individual, upon the other. Market value is impersonal; it is independent of individuals; it is a growth or product from the usual operations of business; and it takes no account of the private needs, capricious judgments, or fanciful valuations of individuals. Market value has some stability, but the fancy estimates of value of property to the owner are as fickle and fluctuating as the private views, whims or personal greed of individuals; and it is submitted that the obligation of the government to make compensation, should not be measured by any such whimsical

standard as that involved in the Errors complained of above.

In a very well considered case in Missouri, the distinction for which I am contending, is indicated in these words:

> "If the criterion of the value given by the court "in the second of the above instructions be correct, "one might be convicted of grand larceny for steal- "ing a finger ring of the intrinsic or market value "of $5, only because, forsooth, being a gift to the "owner by a departed friend, or wife or other loved "one, he placed an estimate upon it far beyond its "value, although of no greater value to third per- "sons than another ring of the same kind, which "could be purchased wherever kept for sale for $5. "The criterion of value by which the jury were told "in that instruction they might be governed does "not apply as a general rule in civil proceedings, "and when the statute requires that property "stolen shall be of the value of $10 in order to con- "stitute the theft there of grand larceny, the term "value" is to be taken in its legal sense, which does "not differ from its common acceptation, and there "is no warrant for allowing any other mode of as- "certaining the value of stolen property in a crim- "inal prosecution than that which prevails gener- "ally in criminal proceedings. It is not the fancy "estimate of value placed upon the property by the

"owner which is to determine whether the theft is "grand or petit larceny, but its actual value as that "value is usually ascertained in other proceedings.

"If one sue another for conversion of personal "property, he recovers not what the property was "worth to him, but its value in the market; and it "would be strange enough if, when the statute de- "clares that no one shall be adjudged guilty of "grand larceny unless the goods stolen were of the "value of $10, a criterion of value should be adopt- "ed which would authorize a conviction for that "offense, when the goods stolen were worthless to "third persons and of no market value, but possess "a value which can only be measured by fancy or "sentiment, a measure of value as uncertain and "variable as the whims and caprices of the owner of "the goods, or the witnesses he may introduce to "prove their value. We cannot substitute this for "the stable and certain measure furnished by the "price which such goods command in the market."

State vs. Doepke, 30 Am. Rep., 787-8.

That this same distinction runs through all the law, may be illustrated by a New Hampshire criminal case. In that case it was observed by Bingham, J.:

"It was a chattel. * * * Its value as a stat- "utory subject of larceny is the market value; and "evidence that it is worth $20 to its owner, and

"worth nothing to anybody else, does not show its "market value to be $20. To be of the market "value of $20 it must be capable of being sold for "that sum at a fairly conducted sale,—at a sale "conducted with reasonable care and diligence in "respect to time, place, and circumstances, for the "purpose of obtaining the highest price."

State vs. James, 58 N. H., 67.

And this distinction is observed in other branches of the law also. Thus, in an English case, it appeared that the plaintiff was a clothier at Manchester, and sent a parcel of goods by the defendant's railway to his traveler at Cardiff. The parcel was delayed through the negligence of the defendants, and the traveler after waiting two days beyond his usual time, left before it was delivered, and the goods were consequently not sold but forwarded, instead of a fresh parcel, to the traveler at the next town he visited. No notice had been given to the defendants of the object for which the goods were sent. The County Court Judge having decided in favor of the plaintiff, and included in the damages the profits which the plaintiff would have probably made by the sale of the goods at Cardiff, the defendants appealed against this decision. On appeal, it was argued that the market value is the value of the goods *to the plaintiff* for purposes of sale; but the court held that "the market value of the goods was their "value in the market *independently of any circumstan-*

"*ces peculiar to the plaintiff*, and that the profits that "would have been made by the sale of the goods at "Cardiff through the plaintiff's traveler being present, "could not be recovered."

G. W. R. R. vs. Redmayne, L. R., 1 C. P., 329.

When we turn to the special subject of market value in eminent domain proceedings, we find the same distinction recognized, and the same rule universally applied. Thus, in a well considered and frequently cited California case, the following language was used:

> "The word 'value' is used in different senses. "Bouvier, in his definition, says: 'This term has two "'different meanings. It sometimes expresses "'the utility of an object, and sometimes the power "'of purchasing goods with it. The first may be "'called the value in use, the latter the value in "'exchange.' For the purposes of the law of em- "inent domain, however, the term has reference to "the value in exchange, or market value. There "are some cases which seem to hold that the value "in use to the owner is to be taken if it exceeds "the market value. But it will generally be found, "on a careful examination, that such cases either "relate to the damages accruing to the owner from "the taking, and not to the value of the property "itself, or overlook the distinction between the two

"things. The consensus of the best considered "cases is, that for the purposes in hand the value "to be taken is the market value, by which is un- "doubtedly meant, not what the owner could real- "ize at a forced sale, but 'the price that he could " 'obtain after a reasonable and ample time, such " 'as would originally be taken by an owner to " 'make sale of like property.' "

S. D. L. Co. vs. Neale, 78 Cal., 67-8.

In a well considered Massachusetts case, the nisi prius Court charged the jury, in an eminent domain case involving a leasehold interest, as follows:

"The value of the leases is their market value; " 'market value' means the fair value of the prop- "erty, as between one who wants to purchase and "one who wants to sell any article, not what "could be obtained for it under peculiar circum- "stances, when a greater than its fair price could "be obtained; not its speculative value; not a value "obtained from the necessities of another. Nor "on the other hand, is it to be limited to that price "which the property would bring when forced off "at auction, under the hammer. It is what it "would bring at a fair public sale, when one party "wants to sell and the other to buy. The fact, "therefore, that one of these lessees, Lawrence, as "had been argued by his counsel, did not want to

"move, wanted to stay there, would have paid a "very large sum to stay there, is not a test of market "value, because it is not a case of one who wants to "sell and one who wants to buy. If Lawrence had "wanted to go out, the question is, what would his "lease have brought? *Not what it would have been "worth to him if he had wanted to stay there, be- "cause it may have been of greater value or of less "value to him than its value upon the market. "That simply determines its value to him, not its "market value.* The question for you to consider is, "if Lawrence wanted to sell this lease, what could "he have obtained for it upon the market, from par- "ties who wanted to buy and would give its fair "value?"

These instructions were attacked on appeal at considerable length, but, notwithstanding, the respondent was not called upon to reply; and the court, through Gray, C. J., subsequently a member of the Supreme Court of the United States, held these instructions to be "correct and sufficient," and overruled the exceptions.

Lawrence vs. Boston, 119 Mass., 126, 128-9, 132.

The same idea recurs in a Minnesota case. There, an attempt was made to fix value by proof of the utility of the property to a particular corporation for a particular purpose, namely, railroad purposes; but the lower Court excluded the questions asked, and on appeal, the Supreme Court said:

"Whether the two excluded questions were ad-
"missible or not, it is quite apparent that the wit-
"ness, according to his own testimony, was unable
"to answer them, and that the exclusion, therefore,
"worked no prejudice to the appellant. But, aside
"from this consideration, we are of opinion that the
"view taken by the court below was the correct one,
"viz., that the proper question was, what is the
"value of the property sought to be condemned for
"any purpose? that is to say, for any purpose for
"which it is adapted and is available. No reason
"can be given why property taken under the em-
"inent domain law by a railroad company, or for
"any public purpose, should be paid for at a rate
"exceeding its general value—that is to say, its
"value for any purpose. Any use for which it is
"available, or to which it is adapted, is an element
"to be taken into account in estimating its general
"value. But where a condemnation is sought for
"the purposes of a railroad, to single out from the
"elements of general value the value for the spe-
"cial purposes of such railroad, is in effect to put
"to a jury the question, *what is the land worth to*
"the particular railroad company, rather than what
"is it worth in general? The practical result would
"be to make the Company's necessity the land-own-

"er's opportunity to get more than the real value "of his land."

Stimpson vs. R. R., 27 Minn., 284.

In Moulton vs. Newburyport Water Co., above cited, the rule was briefly, but clearly formulated thus:

"The damages must be measured by the market "value of the land at the time it was taken; not "its value to the petitioners, nor to the respondent; "not the value which it might have under different "circumstances from those then existing."

Moulton vs. N. Water Co., 137 Mass., 167.

In a later case, the lower court charged the jury thus:

"The petitioners were not entitled to swell the "damages beyond the actual market value by any "consideration of its special use. Now, upon the "general subject, how are you to compute the dam- "ages? You are to determine what was the fair "market value of the land taken by the city. In "determining this, the jury ought to determine its "capabilities, and the purposes for which it may be "used, and also that, under the statute, the title "to the land was vested in the respondent. The "value is to be assessed according to its value when "taken, having regard to the uses to which it may "probably be applied. The point to which I want

"to call your attention is the following extract from "the opinion in that case, (Moulton vs. Newbury-"port Water Co., 137 Mass., 163, 167), which I adopt "as the law in this case: 'The damages must be "'measured by the market value of the land at the "'time it was taken; not its value to the "'petitioners, nor to the respondent; not the value "'which it might have under different circumstan-"'ces from those then existing.' The value for a "special purpose is not the test, but the fair mar-"ket value of the land in view of all the purposes "to which it was naturally adapted. That must be "the rule here. I do not suppose it is competent "for you to take into consideration, in computing "these damages, the value of this land to the city "for sewerage disposal and improvement. There "has been evidence how the city was using it, how "advantageous the city has found it to be for cer-"tain purposes; but the laws says, it is not the "value to the city, and neither is it the value to "the petitioners, that is to govern, but the fair "market value of the land in view of all the pur-"poses for which it was naturally adapted."

On appeal, these instructions were fully approved in the following language:

"The instructions so far as shown by the report "are recited above. In giving them, the Court read

"from the opinion in Moulton vs. Newburyport
"Water Co., 137 Mass., 163. Taken as a whole, the
"instructions state correctly and with sufficient
"clearness and fullness the elements of damages
"and the manner in which they should be consid-
"ered by the jury. The jury were told, in sub-
"stance, that in computing them, they were to de-
"termine the fair market value of the land at the
"time of taking; that they were to take into ac-
"count its capabilities, and the purposes for which
"it might be used, and to proceed in view of all the
"uses and purposes to which it was naturally
"adapted, or to which it might probably be applied,
"and that they were to form their estimate of its
"value under all those circumstances; that the
"damages were not to be measured by its value to
"the petitioner nor to the city, nor by the value
"which it might have under different circumstances
"from those then existing, and that the value for a
"special purpose was not the test, but its fair mar-
"ket value in view of all the purposes to which it
"was naturally adapted."

R. R. vs. Worcester, 155 Mass., 35.

And so in New York. The distinction contended for here was fully recognized by so eminent a Judge as Bronson, and in a very well considered case, he remarks:

"But however much the necessity for disarrang-
"ing the plans of any individual may be regretted,
"the greater principle upon which public improve-
"ments are to be affected must be substantially the
"same in all cases. All classes and conditions of
"men hold their property subject to the paramount
"claims of the state; and when it is taken for pub-
"lic purposes, and the question of compensation is
"presented, the only proper inquiry is, what is its
"value? *The question is not, what estimate does*
"the owner place upon it, but what is its real
"worth, in the judgment of honest, competent and
"disinterested men? The use to which the owner
"has applied his property is of no importance be-
"yond its influence upon the present value. If
"highly cultivated, it will be worth more than
"though it had been suffered to run to waste.
"* * * What price will it bring in the market?
"That is the proper inquiry in a proceeding of this
"kind. As between individuals, the owner may de-
"mand any price however exorbitant, for his prop-
"erty; but when it is taken for public purposes,
"he can only demand its real value. That value
"cannot depend in any degree on his own will.
"To allow either his judgment or his fancy in re-
"lation to the proper use of the property to in-
"fluence the question, would be to make the es-

"tate either more or less valuable, as it might hap-
"pen to be possessed by one individual or another."
In re Furman St., 17 Wend., 649, 669, 670.

The same doctrine is recognized in Pennsylvania, in a very recent case, where the Supreme Court of that Commonwealth expressed itself thus:

"Where property is injured by the construction "of public works the measure of damages is the "difference in the market value of the property be-"fore and after the construction. The creation of "noise and dust, the invasion of privacy, the de-"privation of light and means of access, the burden "of additional fencing and like matters are to be "taken into consideration as affecting the market "value. They are not separately to be estimated, "item by item and a result to be reached by adding "together the different estimates, *nor is the effect "upon the particular owner because of anything "peculiar to himself, or his business to be taken in-"to consideration.* The owner's loss is measured "by the difference in the market value of his prop-"erty; this includes all the elements of depreciation "and represents the whole loss. But the separate "items are to be considered, not as distinct items "of loss, but as they affect the market value. This "is the rule established by a long line of cases, "among the more recent of which are Dawson vs.

"Pittsburg, 159 Pa. St., 317; Reyenthaler vs. Phil-
"adelphia, 160 Pa. St., 195; Comstock vs. Clearfield,
"etc. Ry. Co., 169 Pa. St., 582; Struthers vs. Phil-
"adelphia etc. R. R. Co., 174 Pa. St., 291."
Shano vs. Bridge Co., 189 Pa. St., 245.

Other cases to the same effect might be cited; but I believe that a sufficient showing has been made to point out the confusion between market value proper and that personal value which is peculiar to the owner of the property, and which is limited merely by his needs, fancies or whims. The obscurity upon this point resulted in the admission of evidence which was most damaging to the Government, and permitted the defendant to lay before the jury, not evidence of market value at all, but merely of the private and personal estimate of the Plantation Company,—a course which could have had no other tendency except to mislead the jury and to operate to the detriment of the Government, particularly since the burden of proof was erroneously put upon the Government ("The burden of proving the "value of the land rests upon the defendant, and it is "the duty of the defendant to establish the market "value of the land by a preponderance of evidence"; per Morrow, Circuit Judge; Charge to the Jury in U. S. vs. S. V. W. W., No. 12908, Charge filed Jan. 14, 1901). It cannot be said "that these errors were immaterial, as

"it does not appear that they were errors which could "not prejudice the rights of the plaintiff."

Mexia vs. Oliver, 148 U. S., 664, 673.
Gilmer vs. Higley, 110 U. S., 47.
V. & M. R. R. vs. O'Brien, 119 Id., 99.
St. Louis etc. Ry. vs. Needham, 63 Fed. Rep., 107.
Nat. Mas. Assn. vs. Shryock, 73 Id., 774, 781.
Boston etc. R. R. vs. O'Rielly, 158 U. S., 334, 337.

Assignments of Error 14, 15.—In Assignment of Error 14, Mr. Thrum's opinions were excluded, because he was not an "expert." It was purely upon this ground that the Court sustained the objection. But when we turn to Assignment of Error 15, where the Government sought to explain further the standing of Mr. Thrum, by showing his experience on the Ewa Plantation, the defendant's motion to strike out was granted, not upon the ground that this testimony was not proper re-direct examination, but upon the ground that this testimony was not material. I submit, however, that the testimony was material to illustrate Mr. Thrum's qualifications to speak concerning the value of the leasehold; and that in this respect the granting of the motion to strike out, as well as the sustaining of the objection forming Assignment of Error 14 were erroneous. The rule seems to be that the average intelligent man, *if shown to be qualified by a knowledge of the value in*

controversy, may give his opinion thereon, though not a technical "expert."

2 Lewis, sec. 437.
Swan Co. vs. Middlesex, 101 Mass., 173.
Huff vs. Hall, 56 Mich., 456.
P. R. R. vs. Bunnell, 81 Pa. St., 426.
C. R. R. vs. Wolf, 74 Geo., 664.
S. D. L. Co. vs. Neal, 78 Cal., 63.
T. H. R. R. vs. Crawford, 100 Ind., 550.
Alt. vs. Cal. Fig. Co., 19 Nev., 118.
Dalzell vs. Davenport, 12 Iowa, 437.
Whitfield vs. Whitfield, 40 Miss., 352.
Cantling vs. R. R., 54 Mo., 385; 14 Am. Rep., 476.
Mish vs. Wood, 34 Pa. St., 451.
Thatcher vs. Kaucher, 2 Colo., 698.
Cooper vs. State, 53 Miss. 393.
Cooper vs. Randall, 59 Ill., 317.
Wash. Co., vs. Webster, 68 Me., 449.
Foster vs. Ward, 75 Id., 594.
Sullivan vs. Lear, 23 Fla., 463; 11 A. S. R., 388.
Whiting vs. Ins. Co., 76 Wisc., 592.
Reggan vs. R. R., 111 Mo., 456.
Latham vs. Brown, 48 Kans., 190.
Finch vs. R. R., 46 Minn., 250.
Roberts vs. Boston, 149 Mass., 346.
Laing vs. R. R., 54 N. J. L., 576.

Assignment of Error 16.—This was an attempt, in

the language of counsel, (Record, p. 236), to impeach the character of Mr. McCandless' testimony, because some person other than Mr. McCandless had placed upon the Oahu Sugar Plantation a valuation which counsel deemed to be inconsistent with the valuation placed by the witness upon the property, that is to say, the real estate, of the Oahu Sugar Plantation. The witness had testified, pages 232. 621, that "the Oahu Sugar Company "leased Ford Island and peninsula from the H Estate "for $12½ per acre per annum"; and on cross-examination, counsel undertook to show, for the avowed purpose of discrediting the witness, that a certain large valuation was placed by the Company upon its plant at Ford Island,—so large, counsel thought, as to be inconsistent with the witness' statement that the original lease was for $12½ per acre per annum. No attempt was made to show that the original lease was not for $12½ per acre per annum; no attempt was made to show that the large and inconsistent valuation, so claimed, reflected the views of the witness; and no attempt was made to show that the witness in any way participated in the making of this alleged inconsistent valuation. It did appear from the testimony of the witness that he was a director in the Oahu Sugar Company; it did appear that all of Ford Island which was in fact condemned was 23 acres as against 142 acres originally intended for condemnation, and on which the alleged inconsistent valuation was based; and it did

appear, affirmatively, not only that the witness neither signed nor swore to the alleged inconsistent valuation, but also that, although a director, yet he was not present at the meeting of the Board of Directors at which the alleged inconsistent valuation was settled upon, and in no way participated in the making or filing of that valuation. In other words, the only imaginable thread of connection between the witness and this pretended inconsistent valuation, consisted in the naked and totally undraped fact that the witness happened to be at the time a director in the corporation. Absolutely no personal connection was established between him and the alleged inconsistent valuation, and no foundation whatever existed to charge him with any responsibility for this act of the other directors of the corporation.

But, again. There was no showing that the United States participated, directly or indirectly, in the framing of this alleged inconsistent valuation. No relation whatever was established between that valuation and the petitioner herein against whom the valuation was offered; and thus, as against the Government, this alleged inconsistent valuation amounted to nothing. It appeared, however, that all contentions between the Oahu Sugar Company and the Government had ceased and had been determined by an amicable settlement. And it is submitted, therefore, that this illegitimate attempt to

"impeach" the fairness of Mr. McCandless was erroneous and prejudicial to the rights of the Government.

So far as the amicable settlement between the Government and the Sugar Company was concerned, that was a proceeding in which the defendant here had neither part nor lot; and it was a proceeding which the Government had an undoubted right to close and forever seal up by "buying its peace."

Daly vs. Coons, 64 Ind., 548.
Kinney vs. C. V. Mining Co., 4 Saw., 441.

In the next place, how can the United States, in this present cause, be bound by the views of certain officers of the Oahu Sugar Company, or by the views of the Sugar Company, as to the value of a piece of land not involved in this case? Such views would not conclude the United States, even if they related to the land in controversy in this case; how much less, then, when relating to other and foreign lands? All the objections, indeed, which have heretofore been urged against excursions into outside lands, and against the attempt to swell the value of the land involved here by a consideration of some improvement, advantage or higher valuation upon lands located elsewhere, make with equal force against the position taken in this behalf. This attempt was sheer res inter alios acta; it obliterated the legal identities of transactions; and it seemed to be the opinion of counsel that any transaction which might possibly help his case

should be admitted in evidence, no matter how foreign, and no matter how barren of privity. It seemed, indeed, to be his idea that any transaction could be proved to bind the Government, whether any connection between the Government and the transaction was established or not.

But before this alleged inconsistent valuation could have been admitted to "impeach" McCandless, some sort of privity should have been established between him and the alleged inconsistent valuation, some sort of participation by him in that valuation, so that the valuation could fairly and reasonably be said to be his act, and chargeable against him. But McCandless, as the testimony shows, although a director in the Company, yet was not present at the meeting of the Board of Directors at which the alleged inconsistent valuation was framed, neither signed nor swore to the instrument setting forth that valuation, and in no manner participated in the making thereof. As already observed, that valuation was the act of the corporation, and the only thread of connection between the witness and it lay in the naked circumstance that he happened to be a director. But

> "The general doctrine is well established, and ob-
> "tains both at law and in equity that a corporation
> "is a distinct entity, to be considered separate and
> "apart from the individuals who compose it, and is
> "not to be affected by the personal rights, obliga-

"tions and transactions of its stockholders; and this,
"whether such rights accrue or obligations were in-
"curred before or subsequent to incorporation."

Moore Co. vs. Towers Co., 87 Ala., 206.

Boone, Corporation, sec. 3.

There seems to be no such identification of the Director with the corporation, or of the corporation with the director, as to charge either with responsibility for the act of the other; nor is there any rule of law which charges either a stockholder or a director with actual knowledge of the business transactions of the corporations, merely because he is such stockholder or director; and it is even a matter of grave concern whether the books of a private corporation are competent evidence against a member or director of his contract or private dealings with the company, for in that respect he is deemed a stranger.

Rud vs. Robertson, 126 N. Y., 113.

Stephens, Evidence, Chase Ed., 114.

Smith vs. Dorn, 96 Cal., 76.

Piersall vs. Tel. Co., 124 N. Y., 256.

S. & L. Soc. vs. Gerichten, 64 Cal., 520.

Aldridge vs. The State, 88 Ala., 113.

Wheeler vs. Walker, 45 N. H., 355.

Phillips vs. The State, 96 Geo., 293.

Wickersham vs. Crittendon, 93 Cal., 17.

Blum vs. Robertson, 24 Id., 128.

Hagar vs. Cleveland, 36 Md. 477.

Lothiam vs. Wood, 55 Cal., 159.

2 Thompson, Corp., sec. 1932.

People vs. Dye, 75 Cal., 113.

Assignments of Error, 26, 27, 28, 29, 30, 32, 34.—This class of errors are all open to the same objection, namely, that no preliminary foundation was laid to permit the introduction of the testimony complained about. The point made here can be as fairly stated and explained by one illustration as by many; for the obvious reason that the erroneous admission of improper testimony would, within the rule in Mexia vs. Oliver, 148 U. S., 673, be as fatal in one case as in many, because it would be impossible to say that the jury did not act upon the illegal testimony. Not, of course, that I surrender one jot or tittle of the various errors enumerated at the head of this paragraph; but only that, for purposes of convenience in presentation, one illustration will serve my purpose. Take, for example, the testimony of Goodale. From the beginning to the end of his direct examination, the one solitary instance in which market value is mentioned, is when the Government objected to his testimony upon the ground that it did not appear that he knew the market value of the property in dispute on July 6th, 1901. He tells us of his place of residence, his occupation, and the size of the plantation of which he is manager, so far as its planted area is concerned. He tells us that his Plantation is in the district of Waialua, on the Island of Oa-

hu. He tells us that he has had 23 years' experience in this country "in the growth and manufacture of sugar"—be it observed. He says that he is familiar with "the ag-"ricultural land on this Island"; and he tells us, when asked if he knows "the value of it," that he "thinks" so. Up to this point in his examination, no reference has been made to the land involved in this case, or to its market value; and now, for the first time, he is asked whether he knows the land sought to be condemned. Goodale does not pretend that he "knows" the land, and contents himself with saying merely, "I have seen the land." He says that he was there in October, 1901, and it appears from other portions of his testimony that this was the only visit which he ever paid to it (Record, pp. 329, 659). Since October, 1901, he has not been upon the land except as a passenger in the railroad train that crossed it at one point. He was then asked what kind of an examination he made at the time of this visit; and there his preliminary examination as an "expert" abruptly and incontinently ceased. It will be observed that notwithstanding that the vital issue in this case was the market value of the property involved at the time of the taking, yet in this examination of Goodale no reference whatever was made to that subject-matter, and no attempt whatever was made to qualify him upon that essential point. Notwithstanding the utter absence of any foundation—of any qualification—of any showing in the remotest way that he was qualified to speak to the market

value of the leasehold interest involved in this litigation, he was asked the question which appears on pages 328, 658-9, of the Record. To this question the Government interposed the following objection:

> "Mr. DUNNE. Objected to as immaterial, irrele-
> "vant and incompetent; without foundation in this,
> "that it is not a fair statement of the evidence; with-
> "out foundation in this, that it does not appear that
> "the witness does know the market value of such
> "property on the 6th of July, 1901."

This objection was overruled, the Government excepted. And then came before the jury the illegal and damaging testimony, "three hundred thousand dollars." On what principle can this ruling, which is typical of this class of errors, be sustained? Opinion evidence is itself an exception to the general rules of evidence. There is no more familiar principle in the law of evidence than that the opinions of witnesses, except in certain specified, limited and exceptional cases, are irrelevant; for, "if it "were a general rule of procedure that witnesses might "be allowed to state not only those matters of fact about "which they are supposed to have knowledge, but also "the opinions they might entertain about the facts in "issue, the administration of justice would become a lit-"tle less than a farce" (2 Jones, Evidence, sec. 361). And, therefore, it is absolutely without excuse to permit witnesses to give their opinions in evidence except in those

certain specified, limited, and exceptional cases, and not even then, unless the proper foundation is laid by showing that they are qualified to speak to the point in issue. The point in issue, and the only point in issue, was the going market value of the defendant's leasehold interest at the time of the taking; but Goodale was in no manner or form qualified to speak upon this subject. He had visited the land in controversy but once; and, like any other witness, might have been called upon to describe what he saw there; but instead of treating him in this light as a witness simply, his evidence was treated and submitted to the jury as expert evidence of a subject-matter as to which not one thread of foundation was laid. His knowledge of market value in some other neighborhood, even if any such knowledge had been established (which was not done), would not have qualified him to speak concerning the land in controversy; for if he had no knowledge of the going market value of the defendant's leasehold of this particular land, he should have not been allowed to guess from his knowledge of values in some other neighborhood (if such knowledge had been established, which was not done), and then have that guess left for the consideration of the jury as expert testimony. But not only was no showing made of any knowledge by Goodale of market value elsewhere, but also there was no showing, foundation or qualification laid by or for him in the matter of special or peculiar knowledge of market value of the land in controversy. He had visited

the land once; that was the length, breadth and depth of his knowledge of it; and while, as already suggested, he might have testified as an ordinary witness to what he saw on the premises, yet he was not so questioned, he was treated as an expert, and his unfounded and unqualified guess was submitted to that jury as that of an expert in market values. It is earnestly submitted that this error is beyond all remedy. The Supreme Court of Pennsylvania in a very recent and well considered case thus discusses this matter:

> "An expert is a person experienced, trained, "skilled in some particular business or subject. An "expert witness is one who because of the possession "of knowledge not within ordinary reach is specially "qualified to speak upon the subject to which his at- "tention is called. Thus, a chemist, a physician, a "mechanic, an artist, has special knowledge of the "things that fall within the range of his studies and "his daily practice, and because of such special "knowledge, not within ordinary reach, his testi- "mony upon a subject relating to his particular line "of study or research is regarded as most exact and "entitled to more weight than that of witnesses not "possessing the same opportunities for acquiring "thorough knowledge of the subject. Many per- "sons may know something about a given question, "and be competent as witnesses to tell you what they

"know. A few may have an intimate, an exception-
"al, knowledge and be entitled to speak as expert
"witnesses. Now the question to which the so-
"called expert witnesses were called in this case was
"the value of the plaintiff's land before the location
"of the defendant's railroad over it, and its value as
"affected by that location. That they were experts
"in the value of real estate elsewhere did not give
"to their testimony the value of expert evidence
"when they spoke of the plaintiff's property. If they
"had no knowledge of the prices of land in that
"neighborhood before and after the location of the
"railroad, they ought not to be allowed to guess from
"their knowledge of prices in some other neighbor-
"hood, and have such guess left for the considera-
"tion of the jury as expert testimony. Sprogle was a
"witness, but he certainly did not show himself to
"have knowledge not within ordinary reach on the
"subject of the value of the plaintiff's land. He had
"no special or peculiar knowledge of values in that
"neighborhood. He knew enough about the subject
"to be entitled to be heard as any other witness
"might be, but expert knowledge means more than
"that. It was a mistake, therefore, to treat or sub-
"mit to the jury his evidence as that of an expert in
"values in the vicinity in which the plaintiff's land
"was situated. His evidence should have gone with
"that of other witnesses who spoke as witnesses

"simply; or in the language of the learned Judge
"found in the bill of exceptions, 'I think he can tes
" 'tify as far as his testimony goes.' He might have
"been an expert in values in Philadelphia or Read-
"ing, but he did not show himself to be such as to
"Delaware County. The knowledge relied upon to
"give the testimony of a witness the value of that of
"an expert must relate to the subject under investi-
"gation."

Struthers vs. R. R., 174 Pa. St., 298-9.

It may be claimed that Goodale's position as a plantation manager,—though the manager of a plantation in another neighborhood than the one involved in this case,—might put him in a position to be advised of the going market value of the land in controversy; I dispute the proposition of fact here implied; and I point out that his testimony wholly fails to show that this was so. The very most that could be claimed on this score, allowing the utmost liberality to this defendant, would merely be that Goodale, just like a great many other men, had the opportunity to acquire the requisite knowledge; but neither his testimony nor anything else in the case, even indicates that he improved this opportunity (if the opportunity existed), and acquired the essential knowledge. In addition to this, it is perfectly clear that the mere opportunity for acquiring the knowledge indispensable to permitting the reception of opinion evidence as to market value, cannot suffice; the proper

foundation must be laid by showing the actual existence and possession of such knowledge by the person whose opinion is offered. Thus, the Supreme Court of California remarked:

> "The rule is that mere opportunity afforded for "observation will not constitute one an expert, or "render his mere opinion admissible as evidence; he "must have been educated in the business about "which he testifies; or it must first be shown that he "has acquired actual skill and scientific knowledge "upon the subject."
>
> Goldstein vs. Black, 50 Cal., 465.
>
> Estate of Blake, 136 Id. 306, 307.

And see, to the same effect:

> Ellingwood vs. Brag, 52 N. H., 490.
>
> Perkins vs. Stickney, 132 Mass., 217.
>
> Page vs. Parker, 40 N. H., 47.

And speaking upon this subject, the Supreme Court of California remarks:

> "Conceding that the testimony may have been ad- "missible, the witnesses offered failed to show them- "selves possessed of the requisite knowledge to au- "thorize them to testify as to the value of the land.
>
> " 'Where a witness is produced to testify in the " 'character of an expert, as to the value of the prop- " 'erty, it should appear that he has some special

" 'skill or experience, or peculiar knowledge of the
" 'value of the class of property about which it is
" 'proposed to question him, such skill or knowledge
" 'having been acquired by him in the line of his pro-
" 'fession or business.' (Roger on Expert Testi-
"mony, sec. 154.)

"According to Wharton on Evidence, section 447,
"two essentials are requisite to a proper estimate
"of value:—

" 'First—A knowledge of the intrinsic properties
" 'of the thing.

" 'Secondly—A knowledge of the state of the mar-
" 'ket.

" 'As to such intrinsic properties as are occult
" 'and out of the range of common observers, experts
" 'are required to testify; as to the properties which
" 'are cognizable by an observer of ordinary busi-
" 'ness sagacity, being familiar with the thing, such
" 'an observer is permitted to testify.'

"A witness called upon to give an opinion on the
"subject of value, whether offered as an expert or
"not, must lay a proper foundation for the introduc-
"tion of his opinion, by showing he possesses the
"means to form an intelligent opinion, 'derived from
" 'an adequate knowledge of the nature and kind of
" 'property in controversy, and of its value.'

"We may assume the residence of the witness in
"the vicinity of the property in question, and their

"pursuits, to have given them a reasonable oppor-
"tunity to become acquainted with the nature and
"kind of land in dispute, but it does not follow, and
"their testimony does not show them to possess
"any such knowledge as to its value, as to warrant
"them to give an opinion on that subject.

"There is no doubt that a witness acquainted
"with the value of property may give an opinion as
"such value, but he must first be shown to possess
"the requisite knowledge, and then, although such
"knowledge is not the result of any particular skill
"in a particular pursuit or branch of business, or de-
"partment of science, he may yet be heard. Where,
"however, the knowledge is wanting, the opinion
"should be rejected."

Reed vs. Drais, 67 Cal., 492-3.

And see, to the same effect:

Whitney vs. Boston, 96 Mass., 312.
Haight vs. Kimbark, 51 Iowa, 13.
Daly vs. Kimball Co., 67 Id., 132.
Russell vs. Hayden, 40 Minn., 88.
Terpenning vs. Ins. Co., 43 N. Y., 279.
Beadell vs. R. R., 44 Id., 367.
LaMour vs. Caryl, 4 Den., 373.
Clark vs. Water Co., 52 Me., 68.
Frederick vs. Chase, 28 Ill. App., 215.
Chicago R. R. vs. Mouriquand, 45 Kans., 170.
Omaha Auc. Co. vs. Rogers, 35 Neb., 61.

And the Supreme Court adopts the view of the law for which I am contending:

"The third assignment of error is, that the court "erred in refusing to allow the witness Sabin, intro- "duced in behalf of the defendant, to answer the "question: 'What was the fair rental value per " 'month of this mill and its attachments?'

"This ruling of the court was manifestly proper. "It appears from the testimony of the witness him- "self that he knew of no other silver mill in the "neighborhood of Columbus; that he knew of none "whatever at that time in operation; that he knew "of no silver mill that had been rented at Leadville "or in the State anywhere; and that this was the "first silver mill he had been connected with, though "he had been engaged in mining for twenty years, "and was acquainted with gold mills enough to "know what work they can perform and what they "can earn. He evidently had no such knowledge of "the marketable condition or rental value of such "property as would render his opinion of any use "to the jury beyond the merest guess or conjecture. "His knowledge and experience of mining mills was "such as to render him competent to testify as "to the cost of construction, the value of machinery, "and the expense of putting it up; and upon these "points his testimony was admitted, and was to

"the effect, among other things, that the mill cost "$75,000."

N. Y. Mg. Co. vs. Fraser, 130 U. S., 611.

It is therefore submitted that these errors, of which the Goodale error is taken merely as the type, call loudly for a new trial of this action. At best, expert testimony has been described as unsatisfactory; but it becomes absolutely vicious when it amounts to unloading upon a jury opinions which are not "of any use to "the jury beyond the merest guess or conjecture."

Assignments of Error 38, 39, 40, 41, 42, 43, 44, 45.

Instructions asked for should have been given as asked, when correctly drawn.

People vs. Williams, 17 Cal. 142.
People vs. Eckert, 19 Id., 603.
People vs. Lachenia, 32 Id., 434.

THE VERDICT.

INSUFFICIENCY OF THE EVIDENCE TO JUSTIFY VERDICT.

The verdict in this case fixed the value of the leasehold at $94,000; and the value of the "improvements" at $8,523; thus making an aggregate of $102,523. (Record, p. 462-47.) But is is respectfully insisted as follows:

1. There is no evidence anywhere in this Record fixing the value of this leasehold at $94,000.

2. There is no evidence anywhere in this Record fixing the value of these "improvements" at $8,523.

3. Neither of these findings is responsive either to the theory or to the evidence of either side.

The theory of the government was that, by reason of its character and situation, the land condemned was of small value. In support of this theory, the Government offered consistent evidence:

ARCHER: $25 per acre, or $14,025; Record, p. 163, 583-4.

L. L. McCANDLESS: $40 per acre, or $22,440; Record, p. 197-8, 595.

J. A. McCANDLESS: $17½ per acre, or $9,818; Record, p. 227-230, 620-1.

CORP. EXH.: $100,000; Record, p. 613.

TAX RETURN: 1900; $50,000; Record, p. 132-141, 567-571.

TAX RETURN: 1901; $50,000; Record p. 141-4, 571-5.

Of the above six valuations, three (Archer, L.L. and J. A. McCandless) referred to the specific piece of land involved in this litigation; and the average of these three valuations is $15,428.

This average is about one-seventh of the verdict; and it is confidently submitted that a verdict seven times greater than the amount shown by the evidence, is not

responsive to the evidence, does not conform to the evidence, and is not justified by the evidence. The last three of the foregoing estimates are inserted for the sake of completeness, even though that completeness credits the defendant with much more than it is entitled to.

Because the Corporation Exhibit went far beyond the particular land involved in this case, and included in the $100,000 all of the entire landed interests of the defendant, both in fee and in leasehold; while the Tax Return for 1900 included 4,720 acres of leasehold land, or about eight times the land involved in this case; and the Tax Return for 1901 included 4,770 acres of leasehold land, or about eight times more than is involved in this case. But even giving the defendant the full benefit of these last valuations, the average of the entire six valuations would only be $41,381,—or, not one-half of the amount found by the verdict.

The theory of the defendant was that the land condemned was of great value; and the defendant introduced evidence in line with that theory:

LOW: $400,000; Record, p. 288-9; 635-6.
GOODALE: $300,000; Record, p. 328-9; 658-9.
MEYER: $300,000; Record, p. 348; 667-8.
BOLTE: $275,000; Record, p. 267-9; 628-9.
AHRENS: $275,000; Record, p. 355-6; 670-1.
THURSTON: $256,500; Record, p. 373-4.

CASTLE: $250,000; Record, p. 318; 652.
RENTON: $250,000; Record, p. 340-1; 664-5.
MORGAN: $175,000; Record, p. 367; 677-8.
ANSWER: $144,945; Record, p. 39.

The average of these ten valuations is $262,645,—an amount vastly greater than double the amount fixed by the verdict. A comparison of these values reveals the most startling differences; it is simply impossible to predicate reliability of any one of them; and "The wide "conflict in the testimony of defendant's witnesses shows "upon what an unsubstantial and conjectural basis they "rest."

U. S. vs. Seufert, 87 Fed. Rep., 40.

It is thus perfectly plain that this jury, in framing this verdict, did not conform to the evidence on either side, but decided the case wholly outside the evidence. The verdict was not responsive to the evidence for the Government; it was considerably over double the value shown by that evidence; if that were the only evidence in the case, the verdict would have ben denounced as wholly without, and unjustified by, the evidence; and since this verdict, even upon the most liberal allowances to the defendant, was more than two times in excess of the average of the Government's estimates, it is perfectly plain that the jury did not conform to the evidence produced by the Government.

But although the jury were undoubtedly greatly influenced by the extravagant estimates of the defendant, yet their verdict was not one-half of what it might have been, had they fully accepted those estimates as their guide; none of them were fully accepted.

It is impossible to say that this jury acted upon either line of evidence; the verdict establishes a clear departure from the evidence; it is not justified by the evidence on either side. This jury was limited in their disposition of this case to the evidence duly received, and to that only; they could base no finding on what they saw at the view of the premises; the charge of the Court prohibited that. In charging the jury the Court observed:

> "If in the course of this trial the Court has by "word or expression appeared to favor one side "more than the other, it is not intended, it is the duty "of the Court, and is its aim, and it should be the "duty of the Jury to do absolute justice between the "parties in this as well as in all other actions, and "you are simply to take the law from the Court and "confine yourselves solely to a consideration of the "testimony produced in the case in arriving at a "verdict without limiting your consideration to any "isolated portion of the testimony, but considering "it as a whole, fairly weighing all the testimony,

"both the direct and indirect evidence, with all "reasonable inferences to be drawn therefrom."

Record, p. 454.

"Gentlemen of the Jury, during the trial you vis- "ited the lands sought to be condemned—the object "of such visit was that you might familiarize your- "selves with the nature and extent of the land and "its physical characteristics and conditions, so as "to better enable you to understand the evidence on "the trial of the case. The knowledge so acquired "may be used by you in determining the weight of "conflicting testimony respecting the value of the "leasehold interest in those lands, but not other- "wise; the Court instructs you that there is no "testimony in the case as to the value of the ar- "tesian well on said premises. You will therefore "not give the matter of this well any consideration."

Record, p. 456-7.

These expressions of opinion are fully supported by the books:

Laflin vs. R. R., 33 Fed. Rep. 415, 424.
McQueen vs. Mechanics' Inst., 107 Cal., 163.
Tully vs. Fitchburg R. R., 134 Mass., 499.
Davis vs. Henney, 1 Metc. (Mass.), 221.

In the California case just cited, it was argued for the appellant that:

"The Court so used its discretion when it granted "a new trial on the ground of insufficiency of evid- "ence, as the testimony the jury obtained in its visit "to and examination of the premises may have been "the basis of the verdict."

But the Court met this argument in the following manner:

"The purpose of allowing the Jury to visit the "premises was to enable them to understand the "evidence introduced on the trial. Upon such evid- "ence we must presume their verdict was based. "The fact that the jury was allowed to visit the "premises cannot deprive the court of its jurisdic- "tion to grant a new trial. This it should do not- "withstanding a conflict in the evidence, if fully con- "vinced that the verdict was wrong."

McQueen vs. Mechanics' Inst., supra.

These suggestions are in line with the settled rule that the verdict must be based upon and conformed to the evidence, and that where the verdict cannot be justified upon any reasonable hypothesis presented by the evidence, it should obviously be set aside. Thus, if a suit were brought to recover a chattel, the value of which the plaintiff offered evidence to show was $100, and the defense was that the defendant was out of the jurisdiction at the time of the taking, and the jury

should return a verdict for the plaintiff for the value of $50, such a verdict, of course, would not be allowed to stand; for it would neither conform to the plaintiff's evidence, nor to that of the defendant. There would be no hypothesis of fact upon which the verdict could be justified; it would be a verdict without evidence to support it; and it is not to be tolerated that the jury should thus assume, in disregard of the law and the evidence, to arbitrate the differences of parties, or to decide according to some supposed natural equity, which in reality is merely their own whim. Indeed, the Supreme Court of California defines "substantial justice" to be "such justice as the law administers when correctly ap-"plied, and not such as may be dictated by the abstract "and varying notions of an individual as to what the "equities of the case may be."

Stringer vs. Davis, 30 Cal., 322.

The position here taken is amply sustained by authority:

Campbell vs. Jones, 38 Cal., 507.
People vs. Knutte, 111 Id., 453.
Bucki vs. Seitz, 39 Fla., 55; 21 So., 576.
Sinclair vs. Hewitt, 102 Geo., 90; 29 S. E., 139.
Ford vs. R. R., 69 Iowa, 627; N. W. 587; 29 Id.,755.
Wilson vs. Ins. Co., 70 Iowa, 91; 30 N. W., 22.
Casey vs. R. R., 84 Ky., 79.
Bank vs. Armstrong, 92 Mo., 265; 4 S. W. 720.

R. R. vs. Wallen, 65 Tex., 568.
U. S. vs. Seufert, 78 Fed. Rep., 524.
Felton vs. Spiro, 78 Fed. Rep., 576.
Wright vs. S. Exp. Co., 80 Id., 85, 98.
Ulman vs. Clark, 100 Id., 180.
Pleasants vs. Fant, 22 L., 780.
Metropolitan R. R. vs. Moore, 30 Id., 1024-5.

The nature and cause of the mistake of the jury are alike immaterial; in other words, it is wholly immaterial by what process the erroneous result was reached. And thus, the affidavits of jurors explaining the grounds of their verdict will not be considered.

14 Ency. Pl. & Pr., 777-8.
Chandler vs. Thompson, 30 Fed. Rep., 38, 45.

"Where the trial judge expresses the opinion that "the verdict is clearly against the weight of evi- "dence, it is his imperative duty to grant a new "trial. In such case, he should not defer his opinion "to that of the jury or render a judgment to ascer- "tain the opinion of the appellate court. If he re- "fuses to set aside the verdict, a new trial will be "granted by the appellate court for abuse of dis- "cretion. * * * When a verdict is clearly "against the weight of evidence, it is the duty of the "court to set it aside and order a new trial. This is "an imperative duty, and cannot be evaded on the

"theory that the jurors are exclusive judges of the "questions of fact and that the evidence can be "weighed on appeal."

14 Ency. Pl. & Pr., 770-1, 776-7.
Zantzinger vs. Weightman, 2 Cranch, C. C., 478.
Wilson vs. James, 3 Blatch., 227.
Slocomb vs. Lurty, Hempst. (U. S.), 431.

And here there is a substantial similarity between the trial in which the verdict was set aside, and the present trial.

Affidavit; J. J. Dunne, Record, p. 502.
Thatcher vs. Gottlieb, 54 Fed. Rep., 312.

Substantial similarity between the two trials:

Affidavit; J. J. Dunne, Record, p. 502.
Thatcher vs. Gottlieb, 54 Fed. Rep., 312.

Former adjudication by Estee, J.;

See Opinion in Motion for a New Trial; Record, p. 508.

This ruling in res adjudicata as to the matters involved;

21 Am. & Eng. Ency., 1st Ed., 240, 252.
1 Van Fleet, Former Adjudication, secs. 14, 18.
Hawk vs. Evans, 76 Iowa, 593.

For all of the foregoing reasons, this verdict is against

the law and the evidence. For a verdict is contrary to law when it is founded on insufficient evidence; and a new trial will be granted on this ground where the evidence of one party is not sufficient to support the verdict, or where there is no evidence to support it, or where the verdict is insufficient to establish a material fact.

14 Ency. Pl. & Pr., 782-3, and notes.
Walker vs. Smith, 1 Wash., 152.
Dow vs. Wells, 11 Fed. Rep., 132.
Crookshank vs. Fourth Nat. Bank, 26 Id., 584.
S. P. R. R. vs. Hamilton, 54 Id., 468.
Vallance vs. B. R. R., 55 Id., 364.
Pleasants vs. Fant, 22 L., 780.

EXCESSIVE VERDICT.

Having rejected the defendant's estimates of value as extravagant, the jury were left with nothing but the evidence of the Government to base a verdict upon. But, as referred to this evidence, the finding was as extravagant as the rejected estimates. While the former adjudication by the court in this case is conclusive upon this point, yet a brief quotation from a recent case in this Circuit may be of value, in view of the reasoning hereinabove advanced;

"I am also of the opinion that the compensation "awarded by the verdict is excessive, and the motion "for a new trial should be allowed on that ground.

"It is argued that all the witnesses who testified as "to value placed the amount above that found by "the jury, and that there is no contradiction of this "testimony. None of these witnesses estimated de- "fendant's damages at less than $100,000, and some "of them placed the damages at $150,000. These "amounts are so far above what was found by the "jury that it is apparent they could not have re- "garded this testimony. It was mere opinion evid- "ence, based in large part upon conjecture. In "arriving at their verdict, the jury must have dis- "regarded the opinions of these witnesses, and form- "ed their own opinions from the facts in evidence, "and these facts do not, in my judgment, warrant "the finding made. In as much as there must be "a new trial upon the other grounds mentioned, it "is unnecessary to comment upon these facts. The "motion for a new trial is allowed."

U. S. vs. Seufert, 78 Fed. Rep., 520, 524.

VERDICT AGAINST CHARGE OF COURT.

This is true generally, as the verdict shows; but it is particularly true of Subd. (d), which reads:

"In arriving at said verdict, said jury was neither "guided nor governed by the preponderance of the "evidence."

In the opinion of the lower Court, heretofore rendered in this case, upon a similar state of facts, that Court observed;

> "The principal question involved in the motion in "the judgment of the Court is as to the verdict be- "ing excessive in amount, and not borne out by the "weight of the evidence. It is presumed that the "jury intended to be controlled in fixing the value "of the leasehold interest in the lands by a pre- "ponderance of the evidence; but in the judgment of "the Court, they failed to do this." Record, p. 508-9.

The Court then discusses at length the evidence in the case, and sums up the situation thus:

> "However, upon a careful consideration of the "reasons advanced both for and against the motion "made by the plaintiff, and after a lengthy exam- "ination of the whole of the record including the "testimony offered on behalf of both parties and "of the able briefs filed herein, I am of the opinion "that the amount of the verdict rendered by the "jury is excessive, and not in conformity with the "weight of the evidence."
>
> Record, p. 512-3.

And it must be borne in mind that the cause in which this opinion was rendered was the same cause now being heard; the pleadings were identical; the evidence

was substantially similar, as affirmatively appears from the uncontradicted affidavit of J. J. Dunne which is made a part of this Record; and that the difference in amount between the two verdicts is a difference to which clearly applies the maxim de minimis non curat lex.

THE MOTION FOR A NEW TRIAL.

It will be remembered that, at the proper time, the Government made its motion for a new trial in the court below. This motion was denied, the Government excepting. The opinion of the Court in this behalf is printed in the record (p. 519-522). An examination of this opinion will show that the Court neither weighed all the evidence, nor exercised its discretion to say whether or not, in its opinion, the verdict was so opposed to the weight of the evidence that a new trial should be granted; the Court below did not accord to the Government its right to have all the evidence weighed, and to have the discretion of the Court duly exercised; and the Court disposed of the motion by saying, in effect, that he felt concluded by the doctrine of concurring verdicts. The exception of the Government was objected to by the Plantation Company purely upon the ground that the order denying the motion for a new trial was not the subject of exception, because not reviewable on appeal; and notwithstanding that the attention of the Court below was specifically directed to the point of the ex-

ception, the objection was sustained and the exception eliminated from the Bill of Exceptions. This is one of the matters in which the Government seeks to correct the Bill of Exceptions. Independently of this, the complaint of the Government is registered in Assignments of Errors No. 46 and 47.

In all this, it is submitted, the lower court erred. In the Federal Courts, the law and procedure of new trials are not modified or affected by state legislation. Such Courts follow the common law both as to the grounds for a new trial and the procedure. The trial courts are free to exercise their discretion in granting or refusing new trials, and such orders are not subject to review by error or appeal. The rule seems to be that, in the Federal Courts, the granting or refusal of a new trial is addressed to the discretion of the court, and is not the subject of review. 14 Ency. Pl. & Pr., 837, 955-6, and notes.

It is just precisely because the ruling of the court upon a motion for a new trial is not the subject of review, that it is so important and responsible a function of the trial courts; and it is just because there is no provision for review by error or appeal, just because the trial court holds the litigant and his estate and his rights in the hollow of its hand,—that the greatest of circumspection and nicest care should be bestowed upon the decision of such motion; and, as will be gathered

from the cases hereafter to be cited, this is the view of the matter taken by the federal judges.

It is said that motions of this character are addressed to the "discretion" of the court, and that is so. But the discretion here meant, does not include whim or caprice; it is not mere arbitrary will; it means a sound legal discretion only, to be exercised in conformity with, and in subordination to, the rules and analogies of the law; and the courts have uniformly held that the discretion which finds play in emergencies similar to that presented here, is not an arbitrary caprice governed by no rules and disposing of the rights of litigants according to whim. Lord Coke defines discretion as

> "Science or understanding to discern between "falsity and truth, between wrong and right, be- "tween shadows and substance, between equity and "colorable glosses and pretences, and not to be ac- "cording to their wills and private affections."
>
> Rook's case, 5 Coke, 100b.

The views of Lord Mansfield were thus stated:

> "Judicial discretion, when applied to a court of "justice, means sound discretion, guided by law. It "must be governed by rule, not by humor. It must "not be arbitrary, vague, and fanciful, but legal and "regular."
>
> Rex vs. Wilkes, 4 Burr, 2539.

And the views of Chief Justice Marshall are thus quoted in a leading New York case:

> "Judicial discretion is a phrase of great latitude;
> "but it never means the arbitrary will of the judge.
> "It is always (as Chief Justice Marshall defined it)
> " 'a legal discretion to be exercised in discerning the
> " 'course prescribed by law; when that is discerned,
> " 'it is the duty of courts to follow it. It is to be
> " 'exercised, not to give effect to the will of the
> " 'judge, but to that of the law.' "
>
> Tripp vs. Cook, 26 Wend., 152.

I cite the following California definition for the sake of its clearness:

> "The discretion intended is not of a capricious or
> "arbitrary discretion, but of an impartial discre-
> "tion, guided, and controlled in its exercise by fixed
> "legal principles. It is not mental discretion, to be
> "exercised, ex gratia, but a legal discretion to be
> "exercised in conformity with the spirit of the law,
> "and in a manner to subserve and not to impede or
> "defeat the ends of substantial justice."
>
> Bailey vs. Taafe, 29 Cal., 424.

The foregoing conception of judicial discretion, particularly as applied to the granting or denying of the motion for a new trial, is amply supported by authority:

> 9 Am. & Eng. Ency., 2nd Edition, 473-4.

Faver vs. Bruner, 13 Mo., 543.
State vs. Cummings, 36 Id., 279.
Maybry vs. Ross, 48 Tenn., 769.
Lybecker vs. Murray, 58 Cal., 189.
Stringer vs. Davis, 30 Id., 322.
Purington vs. Frank, 2 Iowa, 565.
State vs. Painter, 40 Iowa, 298.
Ex parte Marks, 49 Cal., 681.
N. G. Banks, vs. Caldwell, 8 N. Y. Sup., 380.
Carter vs. Wharton, 82 Va., 264.
Harries vs. Roebuck, 47 H. J. L., 228.
Wright vs. Lacy, 22 Minn., 466.

It is thus plain that while motions for a new trial in the federal courts may be said to be addressed to the "discretion" of the Court, still two conditions must concur; first, that "discretion" must be exercised; and secondly, that "discretion" is no vain or willful thing, but is circumscribed and limited by a settled legal theory. This subject was very ably discussed in a recent opinion in the Circuit Court of Appeals for the Sixth Circuit, where Taft, Circuit Judge, said:

"A motion for a new trial is, of course, addressed "to the discretion of the court, and, if the court "exercises its discretion, and either grants or de- "nies the motion, its action is not the subject of re- "view. This is so well settled that it is unneces- "sary to cite authorities upon the point. But the

"motion for new trial is a remedy accorded to a "party litigant for the correction by the trial court "of injustice done by the verdict of a jury. It is "one of the most important rights which a party to "a jury trial has. It is a right to invoke the dis- "cretion of the court to decide whether the injus- "tice of the verdict is such that he ought to have "an opportunity to take the case before another "jury. If, now, in exercising this discretion, it is "the duty of the court to consider whether the ver- "dict was against the great weight of the evidence, "and he refuses to consider the evidence in this "light on the ground that he has not power or "discretion to do so, it is clear to us that he is "depriving the party making the motion of a sub- "stantial right, and this may be corrected by writ "of error. . . . The defendant receiver, therefore, is "entitled to have the court below weigh all the evi- "dence, and exercise its discretion to say whether "or not, in its opinion, the verdict was so opposed "to the weight of the evidence that a new trial "should be granted, and the judgment of the cir- "cuit court must be reversed for this purpose."

Felton v. Spiro, 78 Fed. Rep. 576, 581, 583.

An examination of the opinion of the Court below, however, will indicate very plainly that that court did not "weigh all the evidence," nor did it "exercise its

discretion"—not its whim, but its discretion—in such an analysis of the evidence as to be able "to say "whether or not, in its opinion, the verdict was so op- "posed to the weight of the evidence that a new trial "should be granted." In all this, it is submitted that the lower court grievously erred. The position taken amounted substantially to this: "I will not weigh this "evidence because, whatever I may think about it, I "am confronted by two verdicts substantially the same, "and I am therefore precluded from allowing a new "trial herein." In effect, this was the mental attitude of the court below. It sought to avoid the analysis of the evidence by setting up the doctrine of concurring verdicts; and the opinion substantially says so (Record, p. 522). This, however, operated a denial of rights to which the appellant was entitled, and of the deprivation of which it was authorized to complain.

Something may be said here concerning the number of new trials which the court may grant; but in the consideration of this subject-matter, two things should be kept steadily in view—first, whether there is in existence any statute regulating the matter; and second, whether any authority cited was controlled or influenced by any such statute. In many states the number of new trials which may be granted to one party is limited by statute, as in Illinois, Indiana, Missouri, Mississippi, Tennessee and other States. The object of such statutes is to make concurrent verdicts of differ-

ent juries conclusive on questions of fact, although not approved by the judge; but such statutes have no application where errors of law have intervened. Nor do such statutes apply to appellate courts: a new trial granted by the appellate court is not to be counted as a new trial within the number restricted.

In the absence of statutory prohibition, there is no limit to the number of new trials which may be granted in a cause upon proper grounds. A new trial should be granted as often as prejudicial errors are committed and excepted to; and this is the rule where errors of law have occurred at each trial, it being the duty of the court to grant a new trial as often as the verdict is erroneous.

R. R. vs. Nash, 12 Fla. 497.
University vs. Broadfield, 30 Geo., 1.
Clark vs. Jenkins, 162 Mass., 397.
State vs. Horner, 86 Miss., 71.
Wilkie vs. Roosevelt, 3 John. Cas., 206.
Wilson vs. Gordon, 20 Tex. 568.
Parker vs. Ansel, 2 W. Bl., 963.
Berks Co. vs. Ross, 3 Minn. 520.
Van Blarcom vs. Kipp, 26 N. J. L., 351.
Ross vs. Ross, 5 B. Mon., 20.
Moore vs. Cherry, 1 Bay, 269.
Nun vs. Perkins, 1 S. & N., 412.
Jackson vs. McMurry, 4 Colo. 76.

Coffin vs. Ins. Co., 15 Pick., 291.

Van Doren vs. Wright, 65 Minn. 80.

A full examination of the subject will, in my opinion, make clear that the courts everywhere agree that wherever errors of law have intervened (as they have most greviously intervened in this cause) a new trial will be granted as often as such errors were committed and excepted to.

There is no statute of the United States, with which I am familiar, regulating this subject-matter; and, almost as a consequence, the federal courts seem to have fallen into hopeless conflict upon this subject. A few illustrations may serve the useful purpose of showing that, whatever this conflict may amount to, yet this circuit, according to its latest expressions of opinion, follows the general rule above adverted to as obtaining in the absence of statutory prohibition.

Johnson vs. N. P. R. R., 46 Fed. Rep., 347. In this cause two verdicts were set aside, as appears from the statement of Judge Hanford at page 349. It will be observed that neither statute nor authority is cited, and that the language is very carefully limited to "this particular cause."

Joyce vs. Charleston Ice Co., 50 Fed. Rep., 371. In this case, also, no pretense of statutory authority can be found; and the court, apparently, is deciding the case upon his personal conceptions. It is significant,

however, that no errors of law are apparent in the record; and thus the cause becomes differentiated from that at bar.

Linws vs. C. & O. R. R., 91 Fed. Rep., 964. This cause may be dismissed with the observation that it is distinguishable from the cause at bar in that there were no errors of law. Neither here nor elsewhere, has any judge ever claimed that where errors of law intervene, the rule of concurrent verdicts would be applied.

Hodge vs. Lehigh Valley R. R., 56 Fed. Rep., 195. This cause can scarcely be regarded as being in point. The pleadings were amended; and the evidence varied —indeed, the face of the litigation was changed. Nevertheless, the report shows that the verdict was vacated.

Clear) vs. Fox, 26 Fed. Rep., 90. The syllabus of this case, which was a circuit court case, reads thus:

> "A court will set aside a verdict as contrary to "the law and evidence as often as considerations "of justice may seem to demand. Where one jury "found a verdict for $15,000, which was set aside, "and another jury found a subsequent verdict in "the same case for $9,500, this latter verdict was "set aside."

In the opinion the court refers to the "exceptionally

"intelligent juries" who have passed on the case; and in concluding his opinion, the judge remarks:

> "As a short and easy way of getting rid of person-
> "al trouble, and avoiding the discharge of an un-
> "pleasant duty, I might let it (the verdict) stand,
> "throwing the responsibility on the jury. But I
> "should always feel that I allowed injustice to be
> "done, and the legal rights of a stranger to be vio-
> "lated. On the broad ground that the verdict is
> "contrary to the law of the case, and does not do
> "justice between man and man, it must be set
> "aside."

Wright vs. Southern Express Co., 80 Fed. Rep., 85. In this case the court remarked:

> "Notwithstanding there have been two verdicts in
> "this case in favor of the plaintiff, the court is con-
> "strainedly of the opinion that the jury may be en-
> "tirely wrong in its finding that there has been any
> "substantial injury to the plaintiff by reason of that
> "which occurred on the occasion of which she com-
> "plains. It would be sufficient, and probably it
> "would be best, for the court to go no further than
> "to announce its disapproval of the verdict in this
> "regard; but I think it is due to the parties, if not
> "to the court itself, that some explanation should be
> "made of this dissatisfaction on the part of the
> "court. The information is that the former verdict

"was set aside by the learned judge then presiding "because of a similar discontentment of this point, "and there being two verdicts in favor of the plain- "tiff only adds to the embarrassment that the court "now feels in granting a new trial. Notwithstand- "ing that embarrassment, I am not contended to let "the verdict stand.

"It may be asked, as it was suggested in argument, "why the court did not direct a verdict as requested "by the defendant company, if it takes the views "that the proof was not sufficient to sustain the "verdict. Unquestionably this case is not one for "the direction of a verdict, but, on the contrary, is "distinctly a case which ought to be submitted to a "jury. But it does not follow, because it ought to "be submitted to a jury, that the court should let "the verdict stand, not even two verdicts, possibly "not three or more, if at each succeeding trial the "proof should be precisely the same and no strong- "er for the plaintiff at the last than at the first trial. "The case of Railway Co. vs. Lowerey, 20 C. C. A., "596, 74 Fed., 463, makes, and was intended to make, "this distinction entirely clear, and there could be "no more pertinent illustration of the distinction it- "self than that furnished by the case we have in "hand. Here, as will directly appear, there was not "only the testimony of the plaintiff herself as to "the extent of her injuries, but it was supported by

"that of the expert physicians introduced in her be-
"half. It would be a plain usurpation on the part of
"the court to direct a verdict on such a state of the
"proof, and yet the duty of the trial judge to
"scrutinize the proof, and determine, on an applica-
"tion for a new trial, whether the verdict should
"stand, is just as plain. It is as much a part of the
"right of trial by jury to have the court exercise this
"function of inspecting the verdict after it is ren-
"dered, as it is to have the 12 men hear the testi-
"mony and try the fact. The time might come when
"it would be the duty of the court to yield even to
"the perversities of the jury, and not any longer in-
"terfere with their verdict, but two verdicts are not
"ordinarily conclusive of that duty. Three verdicts
"have sometimes been thought sufficient to invoke
"the duty of non-interference, and by statute in
"some of the states that has been made the rule of
"judgment. * * * On another trial it may be
"that the facts and circumstances will show that
"the plaintiff has been injured by that which oc-
"curred at the Express Office, and I am well aware
"of the fact that I am assuming a grave responsi-
"bility in setting aside a verdict which is the sec-
"ond in the plaintiff's favor; that I am in some dan-
"ger of trenching upon the right of the plaintiff to
"have the weight of this proof determined by the
"jury, and not by me; but the law commits this re-

"sponsibility to the hands of the trial judge for the "very purpose of protecting parties from what may "seem to be unjust verdicts; and so I must accept "that responsibility, give expression and effect to "my decided conviction that the proof does not sus- "tain the verdict, and that it is an injustice to the "defendant company to permit it to stand as a rea- "sonable verdict on such proof as we had at the "trial. I could not direct a verdict for the defend- "ant, yet I expected the jury on the proof, and the "instructions given as to the law, to find for the "defendant, and the contrary action was a surprise "to me. I mention this merely to show the strength "of the conviction I have that the verdict of the "jury was not according to the weight of the testi- "mony, and I can see in the case enough of opportun- "ity to be misled by undue sympathy to account for "it. It is better to submit the question to another "jury. New trial granted."

United States vs. Taffe, 78 Fed. Rep., 524. I call attention to this case as being the latest expression of opinion upon this subject in this circuit; and as being, also, an eminent domain case. Judge Bellinger states his understanding of the rule thus:

"It is further urged against the motion that "there have been two concurring verdicts in this "case, and that the court is not authorized to grant

"a motion for a new trial in such a case. There is "no rule which precludes this court from granting "a motion to set aside a second verdict where there "have been two concurring verdicts."

For all the considerations hereinabove advanced, it is respectfully submitted that the judgment herein should be reversed, and the cause remanded for a new trial.

J. J. DUNNE,

Ass't U. S. Attorney, District of Hawaii,

Counsel for Plaintiff in Error.

No. 896

IN THE

United States Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

THE UNITED STATES OF AMERICA,

Plaintiff in Error,

VS.

HONOLULU PLANTATION COMPANY,
(A CORPORATION),

Defendant in Error.

ON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE TERRITORY OF HAWAII.

Brief of Defendant in Error.

HATCH & SILLIMAN,
Counsel for Defendant in Error.

Press of H. S. CROCKER CO. San Francisco

IN THE

United States Circuit Court of Appeals

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THE UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

HONOLULU PLANTATION COMPANY,
A CORPORATION,
Defendant in Error.

Brief of Defendant in Error.

STATEMENT.

The plaintiff in error is required under the rules of Court to make the statement of the case and the defendant in error is required to make no statement unless he controverts the statement made by plaintiff in error.

This defendant does not controvert the first paragraph of the statement made by plaintiff, but the rest is so much more in the nature of an argument upon the plaintiff's view of the evidence than a statement of the case,

and is so manifestly unfair and uncandid that the defendant does controvert it.

The proceeding was commenced on July 6, 1901, by the filing of a petition on the law side of the Court. The several defendants answered in due time and this defendant in its answer admitted substantially all of the allegations of the petition except that as to the value of the lands sought to be condemned as to which it alleged that it would be damaged in the sum of $200,000 by the taking of said premises by the petitioner, of which said sum it claimed $55,055 for money actually laid out and expended upon said tract, so sought to be condemned, within three years prior to the filing of the petition.

Upon the issue so framed a trial was had resulting in a verdict of $105,000. This verdict was unsatisfactory to both sides, to the plaintiff, because, when considered in connection with the judgment already rendered in the issue between it and the Estate of Bernice P. Bishop, deceased, it exceeded its appropriation; to the defendant, because it believed it did not have a fair and impartial trial.

Thereafter, on January 25, 1902, the court below in passing upon plaintiff's motion for a new trial granted the same unless the defendant would accept $75,000 as full compensation. This the defendant declined to do and a new trial was ordered.

On March 3, 1902, the second verdict was rendered, awarding the defendant $102,523. This verdict, as also the one rendered at the first trial, was returned upon a form given to the jury at the request of counsel for the government. (See Bill of Exceptions, Record 726.)

On May 13, 1902, the second motion for a new trial presented by plaintiff was denied, whereupon a bill of exceptions was prepared and sealed and this writ of error sued out.

Counsel for plaintiff in error, in his statement of the case says that "two theories as to value permeated this case". Two *theories* as to the *law* did permeate the case and apparently two *opinions* also prevailed as to the value.

As to the theories of the law, *plaintiff* argued that nothing existing outside of the four corners of the particular portion of defendant's plantation which the government had marked off for its use could be shown, and, to a very great extent, the Court ruled with him,—so much so that all his requests for instructions were given, at least in substance. Defendant, on the other hand, believed that it was entitled to receive "just compensation" for its property just as it lay, and that to obtain this the actual situation and surroundings of the property ought to be shown; that the property ought not to be stripped of its natural environment and cut off from its advantageous position, but, taking into view all that defendant possessed to avail itself of the usefulness of its leasehold, the value ought to be estimated as though defendant were willing to sell but not obliged to, while the government was willing to buy, but did not have to take it.

(See defendant's requests to charge, Record 444-445.)

These requests were refused and the Court in most instances throughout the trial, as will appear from an

inspection of the transcript, ruled against the defendant. The few exceptions that crept in were mere incidents as compared with the general course of the trial and of the Court's rulings.

REFERENCE TO PLAINTIFF'S BRIEF.

Fifty-five pages of the brief of counsel for plaintiff in error are taken up with a discussion of the right of the Court to have called in a jury to pass on the question of the amount of compensation defendant was entitled to receive for the taking of its property. Much of that discussion is not and never has been in any way controverted here or elsewhere. We relied in the court below and we will rely here almost exclusively on decisions of the Supreme Court of the United States that are exceedingly close in point both on this and every other proposition connected with the case.

Now in the first place no objection was made and no exception was taken to the action of the Court in calling in a jury, and so far as the *record* (not the so-called "transcript of record", but the record in its technical sense) goes it appears that the plaintiff acquiesced in the trying of the issue in this case before a jury. The affidavit of Mr. Dunne we were not called upon to controvert. It has no place in the consideration of a question of this character. Such a procedure is wholly unauthorized and it must be wholly disregarded. Neither can the so-called "supplemental bill of exceptions" be considered at all. It has no standing. It was not sealed by the lower court. These propositions are so thoroughly established that

citation is quite unnecessary, but we may not improperly refer the Court to

Pomeroy's Lessees v. The State Bank of Indiana, 1 Wall., 592, 597-604.

Railroad Co. v. Trustees, 91 U. S., 130, 131.

Not only is the matter not properly before this Court, but it has been authoritatively decided upon the very statute that plaintiff is proceeding under that an ordinary jury at the bar of the Court is the only tribunal contemplated by Congress as the one to pass on the question. Not only this, but the decision so holding was rendered six years before Congress passed the act authorizing the Secretary of the Navy to proceed to acquire these lands at Pearl Harbor for a naval station under said act.

Chappel v. United States, 160 U. S., 499-513.

This, however, is not all. While, under the Hawaiian Statute to which counsel for plaintiff makes reference it is provided that *conflicting claims* to the *property* and the *compensation* shall be determined by the Court, and while, as counsel for plaintiff says, the act *itself* is silent concerning the use of a jury (plaintiff's brief, 106) it does provide in its last section that " where not otherwise ex- " pressly provided the procedure shall be the same as in " other civil actions."

Now the chapter on " civil procedure in courts of record " provides that civil actions shall be commenced by filing a sworn petition.

Ballou's Civil Laws, Sec. 1215, page 483.

Compiled Laws Sec. 1099 page 320

Section 1223, page 486, provides for the appearance of defendant and prescribes two forms of answer, one

Compiled Laws Sec 1106

admitting all of the allegations of the petition which shall "form an *issue of law* to be determined by the Court", the other, denying all the allegations of the petition which shall "form an *issue of fact* to be determined by the jury."

No other or further pleading is required or allowed.

This chapter on Eminent Domain having prescribed that the procedure where "not otherwise expressly provided", should be the same as in other civil actions and there being no provision, as is conceeded, either way as to how the amount of (not the title to) the compensation shall be ascertained, of course it follows by a more certain process of reasoning even than that used by Mr. Justice Gray in the Chappel case that the only trial required or contemplated by the act was by an ordinary jury at the bar of the court.

Counsel for plaintiff has rested his argument upon the section providing that "the court shall determine all "*adverse* or *conflicting claims* to the *property sought to be* "*condemned* or *damages to be awarded* for the taking of the "same." In the first place it need only be said that there were here no "adverse or conflicting claims" either to the property or to the compensation to be awarded. In this counsel for plaintiff fully concurs. His way of putting it is as follows: "But in this case, however, there "are no adverse or conflicting claims, either to the prop-"erty or compensation".

Brief of plaintiff in error, 78.

The *determination* of "conflicting claims" to compensation is one thing; the award of the compensation itself is quite another. One is the logical province of the Court;

the other, the logical province of the jury. There being no "conflicting claims" and the jury having awarded the compensation and the trial court in its discretion having refused to disturb their award the government has no just cause of complaint.

Plaintiff cites certain Hawaiian decisions as being in point, but they are not. The act in question has not been construed by the local court, but was taken with some modifications, notably that of leaving out the scheme of ascertaining compensation by arbitrators, from an old New Zealand statute.

This proposition is discussed further by us under the so-called assignment 48 *infra*.

PLAINTIFF'S FIRST GROUP OF ALLEGED ERRORS.

Twenty-one pages (119 to 140) of the brief are devoted to a discussion of assignments of error numbers 1, 3, 4, 7, 8, 9, 10, 13, 22, 25, 33. They are referred to as a "group" or "class" of exceptions. We have discussed each separately later on in this brief, and they will be readily found from the top-line index, but the cases relied on by us are nearly all cited under "assignment No. 1."

Counsel for plaintiff does not discuss the *assignments of error* made by him. He discusses the *language* used by him in making objections, and cites cases to show that the *objections* stated were in proper cases fatal objections.

We do not controvert his authorities. We do not deny that in proper cases the *rules of evidence and of law* discussed by him would have necessitated a new trial had they been violated. What we strenuously maintain is that there were no rulings made by the Court that were obnoxious to any of those rules. And we ask the Court to look into the *record* (the bill of exceptions) and consider the objections in the light of the questions asked and the situation surrounding them. We refer to the several pages of the record where such rulings will be found in our discussion of each of the assignments of error.

We have discussed each of the assignments of error *seriatim*, and will refer the Court to that discussion without repeating it here. We merely say that tested by the decisions of the Supreme Court that are in point there is no error in the record.

See Boom Co. v. Patterson, Infra pages 20-21.
Monongahela Nav. Co. v. U. S., Infra pages 24-32.
Gettysburg Ry. v. United States, Infra page 24.
Chicago Ry. v. Chicago, Infra page 104.
Montana Ry. Co. v. Warren, Infra pages 73-76.

PLAINTIFF'S DISCUSSION OF ASSIGNMENTS 5, 17, 18 and 24.

(Plaintiff's Brief, 140-146.)

These objections went only to the *form* of certain questions asked during the progress of the trial. Each was addressed to the discretion of the Court, and there could manifestly be no error in the ruling.

Each of the assignments is hereafter discussed under its appropriate heading.

PLAINTIFF'S DISCUSSION OF ASSIGNMENTS 11, 19, 20, 21, 23, 36.

(Plaintiff's Brief, 146-166.)

These several assignments may be discussed so much more clearly *seriatim* that we are disposed to simply refer to the discussion found further over in this brief and pass on to the next group. But we will say only this. "Market value" *was* made the test of the compensation that defendant was to receive, and the jury were so instructed. (Record 459.) Although we earnestly urged and still believe that in this particular case, where the government was taking a *portion* only of our arable land, it was no proper test. (See Record, pages 443, 448.)

"Market value" as a test of compensation is *generally* the most satisfactory means of arriving at the amount of the defendant's damage, but in a case like this, where the particular tract taken is a part of one whole plantation, upon another part of which the defendant has spent more than two million dollars (as appears by the record from plaintiff's own proof, Record 613) in building a mill, erecting extensive irrigating plants, purchasing railroads and other equipment and raising seed cane, to segregate the portion wanted and then insist that the defendant is entitled to no more than it would bring at "a fair public sale" (Record 717), as if there were no plantation there, is so glaringly unfair that in the language of Mr. Justice Brewer in the Monongahela Case "reasoning that would

"lead to such a result must have some vice, at least the "vice of injustice."

But the Courts that do rigidly adhere to "market value" really give the defendant the benefit of the value to it, after all, for they say that the defendant is entitled to the value to *any one*, and of course that includes the value to the defendant:

See Ry. v. R. R., 100 Ill., 21-33; 112 Ill., 590, 605-7;
also infra pages 56-61.

Counsel for plaintiff among other cases quotes a Minnesota case on page 159 of his brief, in which it is said that where a *railroad* is *taking* land it would be wrong to put to a jury the question of what it would be worth "to such railroad"—that is as though we had sought to prove what this land was going to be worth to the government as a test of our compensation. Nothing of the kind occurred at the trial in any shape or form.

The case from Wendell is not at all in point (page 163). In that case the one whose property was taken wanted to get his *price* before his property could be taken, not its *value* to him, but what he deemed he ought to have for it. Nor is there anything for us to take issue with in the other cases cited. Pennsylvania expressly recognizes that there are cases where market value is not a proper test and the Monongahela case quotes at length from one of them.

There was no claim that this property had added value because of anything *peculiar* to the particular owner. It was only that it had added value in view of the *exact situation and surroundings* of the *tract itself* that

we maintained that it had added value, not because the Honolulu Plantation Company, with a capital of $5,000,000, if you please, owned it!

But, as we have already stated, this discussion is best considered in the light of the *record* and the actual rulings made rather than as an abstract proposition, and so we will refer to the subsequent discussion where each assignment is considered under its appropriate number. It will be found that by so examining them that there were no rulings of which the government has any just cause of complaint.

Before leaving this, we wish to call attention to the fact that the portion of a question about "the whole property of the plantation" etc., quoted on page 150 of plaintiff's brief, was stricken out before the question was answered by the witness. (Record 590.)

ASSIGNMENTS 14 and 15, and 26 to 34.

(Plaintiff's Brief, 166-184.)

These ought to be considered together. The first ralate to the testimony of a surveyor, a young man of limited experience who expressly testified that he did not consider that he had any knowledge of values of real estate and leaseholds in or about Pearl Harbor and that vicinity. (Record 597.) The Court held that, in view of this, his opinion as to the value of such a leasehold ought not to be taken, and in that there could certainly be no abuse of discretion.

As to the other rulings, they were made allowing sugar men of great experience and entire familiarity with the kind of leasehold interest whose value was in issue, and

having also a good understanding of the locality as also of the exact portion of land taken by the government, to testify as to their opinion of its market value.

An examination of the qualifications of each of these witnesses as set out in the record will show that there was no abuse of discretion on the part of the Court in permitting them to so testify.

See discussion under each of said assignments.

See also Montana R. R. v. Warren, 137 U. S., 348.

The case of N. Y. Mfg. Co. v. Fraser, 130 U. S., 611, (Plaintiff's Brief 183-184) is not in point There, a witness having knowledge only of gold mills but no knowledge of silver mills was not allowed to testify on an issue of loss of rental value of a silver mill, and the Court held that there was no abuse of discretion. His case was like Thrum's, not like that of Goodale and the other plantation men.

ASSIGNMENT 16.

(Plaintiff's Brief, 167-172.)

Counsel has left out in his discussion of this assignment of error the whole point of the matter.

McCandless was not asked the question asked of him on cross-examination because he testified that this particular leasehold interest was worth only $15 to $20 per acre, but because he said, against the strenuous objection of defendant (Record 231), that he so testified *because* he was a director in the Oahu Sugar Company and because *that company* about a year and a half or two years ago secured a lease of Ford Island from the Ii Estate for

twelve dollars and a half an acre per annum and that the *Oahu Sugar Company* considered when they leased that land that they had given every cent that it was worth *to the Oahu Sugar Company.*

Now then what was that testimony given for? Manifestly the witness meant to convey the impression that because the Oahu Sugar Company at that time paid twelve and one-half dollars per acre for their lease and considered that they had paid every cent that it was worth to them, therefore the lease in issue was, to use his own language, "worth no more to the company (the defendant) than they have to pay for it", (Record 620). Well now it transpired that the Oahu Sugar Company claimed $200,000 as the value of a portion of that same leasehold that, to use his own language, he "had been testifying about". (Record 622.)

Mr. McCandless, having been permitted to give his reason for placing no value on the leasehold in question, and his reason being that, because a company of which he was an officer considered its leasehold of no value, therefore ours was likewise of no value, the Court certainly did not err in permitting us to show by the witness's own mouth that he was mistaken as to his understanding of the opinion of his company concerning the value of their lease. The original inquiry was clearly irrelevant, prejudicial and damaging to the defendant and to have also held that the defendant was to be estopped from going into the truth of the testimony on cross-examination would have been the very essence of injustice.

THE VERDICT, MOTION FOR A NEW TRIAL AND JUDGMENT.

(Plaintiff's brief, 184-211.)

These assignments cannot be considered. That proposition is thoroughly established.

See Chicago R. R. v. Chicago, 166 U. S., 226, 242-246 (a condemnation suit) and cases cited.

Pomeroy's Lessees v. State Bank, 1 Wall., 592, 587-604.

There is no foundation in fact for the claim that Judge Estee did not exercise his discretion in passing on the second motion for a new trial. Counsel admits that the Judge's attention was specifically called to the point of the exception. (Brief, 197-198.)

Judge Estee states in his opinion on the second motion that it is well settled that he *can* again set aside the verdict *if* in his discretion he sees fit to do so, yet there being no questions of law involved, he *will* not. For a full discussion of the matter see assignment number 48, *infra.*

Having considered all the points made by the plaintiff's counsel in his brief we will now refer *seriatum* to the several assignments of error.

ASSIGNMENT NUMBER 1.

(Assignment of Errors, Record 816. Bill of Exceptions, Record 546.)

Assignment number one is based upon an exception taken to the overruling of a certain objection to the following question, "Now, do you know whether there is "any mill belonging to the plantation a mile below this "land?", which said question was objected to by plaintiff in error, upon the grounds that it was not proper cross-examination, and was going into some other land outside of the land sought to be condemned; the answer of the witness was, "I know of the Honolulu Plantation's Mill."

The rules of this Court require that each assignment of error shall quote the full substance of the evidence admitted or rejected, and the above question and answer, together with the objection, ruling and exception, are set forth in the assignment of errors as the full substance of such evidence.

It would seem on the face of it that there would be nothing prejudicial in the ruling and testimony set out, but as this assignment is similar in principle to a number of others, we will go into it more fully than we would otherwise deem necessary.

The objection seems to have been based upon the proposition that there was no logical connection between the question asked on cross-examination and the witness's testimony on the direct. On the direct he said there was no mill on the land sought to be condemned.

The objection also seems to be based upon a belief that under no circumstances could any existing fact or cir-

cumstance outside of the exact boundaries of the particular portion of land sought to be condemned, be shown.

It is alleged by the plaintiff in error in its petition by which the proceedings were commenced that the lands covered by the lease to the Honolulu Plantation Company " include only a part of an entire tract or parcel " of land.

See paragraph three of Petition, page 9 of Record.

On his direct examination this witness, as shown by the bill of exceptions, which has become a part of the record from the Court below, testified that he knew the properties that were involved in the case. (Record, page 539.)

In the course of certain visits he said he had examined the land and to make such examination was the only purpose for which he went there. (Record, page 539.)

The witness further testified that limiting his attention strictly to the land described by him there was not upon it any mill for the crushing or otherwise handling of cane or any other agricultural product. (Record, page 541.)

Now, as is shown by the evidence, there was a large mill belonging to the defendant company, standing on its adjoining plantation lands, which mill was constructed and in existence on the day upon which the proceedings for the condemnation of the portion sought for were commenced, to-wit, July 6, 1901. (Record, 547.) The witness, on his direct, had been asked if there was any mill on the particular portion of the defendant's plantation sought by the government manifestly for the purpose of showing that there was no mill there, and thus producing an impression in the minds of the jury that the lands were of less value for sugar-growing purposes

than they would have been if the defendant had had a mill there with which to grind the cane grown thereon.

Was there not, then, a logical connection between the question asked upon cross-examination and that asked on the direct? Certainly it would seem as though the question was entirely proper unless the defendant could not be permitted to show the existence of a mill adapted to and capable of grinding the cane to be produced on the portion of its land that the government was seeking to take away from it.

Is it the law, that in ascertaining what shall be the defendant's "just compensation", one whose property is about to be taken from him by the strong hand of the Government shall be deprived of the right to show the elements of the value that that property contains? If one of the elements of value happens to consist of an advantageous situation with relation to an adjacent mill, shall he be deprived of the right to show that circumstance? A city lot may be of more value because it is surrounded by improved property, because a multitude of persons live in the immediate vicinity and pass the lot, because of other facts and circumstances lying wholly without the boundary lines of the particular parcel of land,—shall the owner be deprived of the right to show the situation of his property? A quartz ledge may be of greater value because there is a mill near by; an iron mine may be worth more because there is a railroad connecting it with a smeltery; a piece of timber land may be of greater value because of the existence of an adjacent saw-mill. Are the respective owners to be deprived of the right of showing these facts when an inquiry is being made as to what

shall constitute just compensation for the taking of such property?

It may not be out of place to cite the authorities at some length right here, for these questions will recur on considering subsequent assignments of error, a number of which raise practically the same general question. Plaintiff's counsel claimed that the inquiry should be confined rigidly to the four corners of the particular portion of the defendant's plantation it was taking. The Court, though ruling always strongly in plaintiff's favor, nevertheless did permit defendant, to a very limited extent, to show some few facts and circumstances pertaining to the immediate surroundings of the land condemned. The limited extent to which this was done will more fully appear as plaintiff's several assignments of error are considered.

"Just compensation" is defined in Alloway v. Nashville, 88 Tennessee, 510, 8 L. R. A., 123, 125, as follows:

"The 'just compensation' required by our constitu-
"tion is the fair cash value of the land taken for public
"use, estimated as if the owner were willing to sell, and
"the corporation desired to buy, that particular quantity
"at that place and in that form." Citing authorities.

"It includes every element of usefulness and advan-
"tage in the property. If it be useful for agriculture or
"for resident purposes; if it has adaptability for a reser-
"voir site, or for the operation of machinery; if it con-
"tains a quarry of stone, or a mine of precious metals; if
"it possesses advantage of location or availability for
"any useful purpose whatever,—all these belong to the
"owner, and are to be considered in estimating its value.

"It matters not that the owner uses the property for the "least valuable of all the ends to which it is adapted, or "that he puts it to no profitable use at all. All its capa- "bilities are his, and must be taken into the estimate."

The questions calling for opinions in that case were generally in this form: "Considering the property sought "to be condemned in the form it was taken, and as it was "taken, and having regard to the entire property, and the "uses to which it was put, and also the uses to which it "was adapted, and assuming that Mr. Alloway wanted to "sell, but was not obliged to sell, this piece or parcel of "land, and the city wanted to buy it, but was not obliged "to have it, what was the cash market value of the said "property in August, 1887, and what would be just com- "pensation to Mr. Alloway, and what damages should be "allowed him?" Some of the witnesses, especially those put upon the stand by the owners, answered the question as to their acquaintance with the property and its market value.

See also 2 Lewis Em. Dom., 2d Ed., 1051-1055, 1081 and 1113.

The following are quotations from the above:

"All the facts as to the condition of the property and "its surroundings, its improvements and capabilities, may "be shown and considered in estimating its value. Of "course circumstances and conditions tending to depre- "ciate the property are as competent as those which are "favorable. Facts affecting the value of the property "may be shown though they have become known since "the taking or since the commencement of proceedings.

"Where land was available for both mining and town lot "purposes, it was held error to compel the owner to elect "whether he would prove its value for one or the other. "If property has no market value, then it is a question "of real or actual value, and every fact bearing upon such "value may be shown, and those acquainted with the "property, and its surroundings may give their opinion of "its value, though not experts in the strict sense"

"§479. Value for Particular Uses.—The market value "of property includes its value for any use to which it "may be put. If, by reason of its surroundings, or its nat- "ural advantages, or its artificial improvements, or its "intrinsic character, it is peculiarly adapted to some par- "ticular use, all the circumstances which make up this "adaptability may be shown and the fact of such adapta- "tion may be taken into consideration in estimating the "compensation."

2 Lewis Em. Dom., 2d Ed., pages 1051, 1052.

"Whatever in its location, surroundings and appur- "tenances contributed to the availability of the land for "valuable uses, was proper evidence to be considered by "the jury in estimating its salable character, and ascer- "taining its market value."

Note 43, 2 Lewis Em. Dom., page 1051.

Quoting from Boom Co. v. Patterson, 98 U. S., 403:

"'In determining the value of land appropriated for "'public purposes, the same considerations are to be re- "'garded, as in the sale of property between private par- "'ties. The inquiry in such cases must be, what is the "'property worth in the market, viewed not merely with

"'reference to the uses to which it is at the time applied,
"'but with reference to the uses to which it is plainly
"'adapted; that is to say, what is it worth from its avail-
"'ability for valuable uses. Property is not to be deemed
"'worthless because the owner allows it to go to waste,
"'or to be regarded as valueless because he is unable to
"'put it to any use. Others may be able to use it, and
"'make it subserve the necessities or conveniences of
"'life. Its capability of being made thus available gives
"'it a market value which can be readily estimated.

"'So many and varied are the circumstances to be
"'taken into account in determining the value of prop-
"'erty condemned for public purposes, that it is perhaps
"'impossible to formulate a rule to govern its appraise-
"'ment in all cases. Exceptional circumstances will
"'modify the most carefully guarded rule; but, as a gen-
"'eral thing, we should say that the compensation to the
"'owner is to be estimated by reference to the uses for
"'which the property is suitable, having regard to the
"'existing business or wants of the community or such
"'as may be reasonably expected in the immediate fu-
"'ture.'"

2 Lewis Em. Dom., 2d Ed., page 1053.

The author also quotes the following from King v. M. U. Ry. Co., 32 Minn., 225:

"'The evidence minutely described the situation of the
"'premises, the size of the buildings, the nature and
"'character of the machinery, and the uses to which it
"'was adapted. Witnesses were also called to prove the
"'value of the respondent's leasehold interest, including

"'the buildings and machinery. While the exceptions "'to the admission of evidence as well as to the charge "'of the Court vary somewhat in form, and present the "'matter in different shapes, yet the general question "'raised by all of them really is whether it was proper, "'in determining the value of this property, to take into "'account the fact that there was a manufacturing busi- "'ness established and in operation upon the premises. "'That this was allowed is really the alleged error here "'urged, and which we have to consider. We think it "'may be stated as elementary that a person is entitled "'to the fair value of his property for any use *to which* "'*it is adapted*, and *for which it is available*, and *for which* "'*it may be sold.* He is entitled to the value of his prop- "'erty for any use to which it may be applied, and for "'which it would ordinarily sell in the market, whether "'that use be the one to which it is presently applied, or "'some other to which it is adapted. It is, we think, "'equally true that any evidence is competent and any "'fact is proper to be considered which legitimately bears "'upon the question of the marketable value of the prop- "'erty. In this case evidence was introduced tending "'to prove that the fact of a business having been "'established and carried on on the premises for so long "'a time, materially increased the market value of this "'property. If this was the fact, it was competent to "'prove it; and, if proved, we cannot see why it was not "'proper to take it into consideration in estimating the "'value. Who can say that this circumstance would not "'affect its value; that is what a purchaser would ordi- "'narily be willing to pay? When we speak of the

"'*market value* of property as being what purchasers gen-
"'erally would pay for it, we do not mean what men
"'would pay who had no particular object in view in
"'purchasing, and no definite plan as to the use to which
"'to put it. The owner has a right to its value for the
"'use for which it would bring the most in the market.
"'This property was expressly built for a plow factory,
"'and was especially suited for such a use. And it is not
"'unreasonable to suppose that a purchaser would give
"'more for it than he would if the business had been sus-
"'pended for a time or had never been established there.
"'Take, for example, a hotel built expressly as a public
"'house, and not capable for advantageous use for any-
"'thing else; might it not be worth more, that is, bring
"'more in the market by reason of the fact that it had
"'been for years run as a hotel? So with a stand long
"'used for some branch of mercantile business. From
"'that very fact it might be worth more for that kind of
"'business than any other, and a man who wishes to buy
"'might give more for it than he otherwise would. If
"'so, why is not that a proper element to take into ac-
"'count in determining its value? To do so, is not as
"'counsel seems to argue, to pay the owner for his loss of
"'business or loss of future profits, but simply to give
"'him the marketable value of his property for the use
"'for which it is best adapted, and for which it would
"'bring the most.'"

2 Lewis Em. Dom., 2d Ed., pages 1081-1082, quoting from King v. Minneapolis Union Railway Co., 32 Minn. 224, 225-6.

The Supreme Court of the United States has also considered this question of compensation. The leading cases are Boom Co. v. Patterson, *supra*, and Monongahela Navigation Co. v. United States, *infra*.

The following is quoted from United States v. Gettysburg Elect. R'y., 160 U. S., 685:

"As to the *effect* of the taking upon the land *remaining*, "that is more a question of the *amount of compensation*. "If the part taken by the Government is essential to en- "able the railroad corporation to perform its functions, "or if the value of the remaining property is impaired, "such facts might enter into the question of the amount "of the compensation to be awarded. Monongahela Nav. "Co. v. United States, 148 U. S. 312, 333, 334."

In Monongahela Nav. Co. v. United States, *supra*, the following language is used at page 324:

"The question presented is not whether the United "States has the power to condemn and appropriate this "property of the Monongahela Company, for that is con- "ceded, but how much it must pay as compensation "therefor. Obviously, this question, as all others which "run along the line of the extent of the protection the "individual has under the constitution against the de- "mands of the government, is of importance; for in any "society the fullness and sufficiency of the securities "which surround the individual in the use and enjoy- "ment of his property constitute one of the most certain "tests of the character and value of the government. "The first ten amendments to the Constitution, adopted "as they were soon after the adoption of the Constitu- "tion, are in the nature of a bill of rights, and were

"adopted in order to quiet the apprehensions of many, "that without some such declaration of rights the gov- "ernment would assume, and might be held to possess, "the power to trespass upon those rights of persons and "property which by the Declaration of Independence "were affirmed to be unalienable rights.

"In the case of Sinnickson v. Johnson, 17 N. J. L. (2 "Harr.) 129, 145, cited in the case of Pumpelly v. Green "Bay Company, 13 Wall. 166, 178, it was said that 'this "'power to take private property reaches back of all con- "'stitutional provisions; and it seems to have been con- "'siderd a settled principle of universal law that the "'right to compensation is an incident to the exercise of "'that power; that the one is so inseparably connected "'with the other, that they may be said to exist not as "'separate and distinct principles, but as parts of one "'and the same principle.' And in Gardner v. New- "burgh, 2 Johns. Ch., 162, Chancellor Kent affirmed sub- "stantially the same doctrine. And in this there is a "natural equity which commends it to every one. It in no "wise detracts from the power of the public to take "whatever may be necessary for its uses; while on the "other hand, it prevents the public from loading upon one "individual more than his just share of the burdens of "government, and says that when he surrenders to the "public something more and different from that which "is exacted from other members of the public, a full "and just equivalent shall be returned to him.

"But we need not have recourse to this natural equity, "nor is it necessary to look through the Constitution to "the affirmations lying behind it in the Declaration of

"Independence, for, in this Fifth Amendment, there is "stated the exact limitation on the power of the gov- "ernment to take private property for public uses. And "with respect to constitutional provisions of this nature, "it was well said by Mr. Justice Bradley, speaking for "the court, in Boyd v. The United States, 116 U. S., 616, "635: 'Illegitimate and unconstitutional practices get "'their first footing in that way, namely, by silent "'aproaches and slight deviations from legal modes of "'procedure. This can only be obviated by adhering to "'the rule that constitutional provisions for the security "'of person and property should be liberally construed. "'A close and literal construction deprives them of half "'their efficacy, and leads to gradual depreciation of the "'right, as if it consisted more in sound than in sub- "'stance. It is the duty of courts to be watchful for the "'constitutional rights of the citizen, and against any "'stealthy encroachments thereon. Their motto should "'be *obsta principiis.*'

"The language used in the Fifth Amendment in re- "spect to this matter is happily chosen. The entire "amendment is a series of negations, denials of right or "power in the government, the last, the one in point "here, being, 'Nor shall private property be taken for "'public use without just compensation.' The noun "'compensation' standing by itself, carries the idea of "'an equivalent. Thus we speak of damages by way of "compensation or compensatory damages, as distin- "guished from punitive or exemplary damages, the for- "mer being the equivalent for the injury done, and the "latter imposed by way of punishment. So that if the

"adjective 'just' had been omitted, and the provision "was simply that property should not be taken without "compensation the natural import of the language would "be that the compensation should be the equivalent of "the property. And this is made emphatic by the adjec- "tive 'just.' There can, in view of the combination of "these two words, be no doubt that the compensation "must be *a full and perfect equivalent* for the property "taken. And this just compensation, it will be noticed, "is for the property and not to the owner. Every other "clause in this Fifth Amendment is personal. 'No per- "'son shall be held to answer for a capital, or otherwise "'infamous crime,' etc. Instead of continuing that form "of statement, and saying that no person shall be de- "prived of his property without just compensation, the "personal element is left out, and the 'just compensation' "is to be a full equivalent for the property taken. This "excludes the taking into account, as an element in the "compensation, any supposed benefit that the owner "may receive in common with all from the public uses to "which his private property is appropriated, and leaves "it, to stand as a declaration, that *no private property "shall be appropriated to public uses unless a full and exact "equivalent for it be returned to the owner.*"

And on page 328 the following language is used:

"How shall just compensation for this lock and dam "be determined? What does the full equivalent there- "for demand? The value of property, generally speaking, "is determined by its productiveness—the profits which "its use brings to the owner. Various elements enter "into this matter of value. Among them we may notice

"these: Natural richness of the soil as between two "neighboring tracts—one may be fertile, the other bar- "ren; the one so situated as to be susceptible of easy use, "the other requiring much labor and large expense to "make its fertility available. Neighborhood to the cen- "ters of business and population largely affects values. "For that property which is near the center of a large "city may command high rent, while property of the "same character, remote therefrom, is wanted by but "few, and commands but a small rental. Demand for "the use is another factor. The commerce on the Monon- "gahela River, as appears from the testimony offered, is "great; the demand for the use of this lock and dam con- "stant. A precisely similar property, in a stream where "commerce is light, would naturally be of less value, "for the demand for the use would be less. The value "therefor is not determined by the mere cost of con- "struction, but more by what the completed structure "brings in the way of earnings to its owner. For each "separate use of one's property by others the owner is "entitled to a reasonable compensation; and the num- "ber and amount of such uses determine the produc- "tiveness and the earnings of the property, and, there- "fore, largely its value. So that if this property, belong- "ing to the Monongahela Company, is rightfully where it "is, the company may justly demand from every one "making use of it a compensation; and to take that prop- "erty from it deprives it of the aggregate amount of "such compensation which otherwise it would continue "to receive. What amount of compensation for each sep- "arate use of any particular property may be charged

" is sometimes fixed by the statute which gives authority " for the creation of the property; sometimes determined " by what it is reasonably worth; and sometimes, if it is " purely private property, devoted only to private uses, " the matter rests arbitrarily with the will of the owner. " In this case, it being property devoted to a public use, " the amount of compensation was subject to the deter- " mination of the State of Pennsylvania, the State which " authorized the creation of the property. The prices " which may be exacted under this legislative grant of " authority are the tolls, and these tolls, in the nature of " the case, must enter into and largely determine the " matter of value. In the case of Montgomery County v. " Bridge Company, 110 Penn. St., 54, 58, in which the " condemnation of a bridge belonging to the bridge com- " pany was sought, the court said: 'The bridge structure, " 'the stone, iron and wood, was but a portion of " 'the property owned by the bridge company and taken " 'by the county. There were the franchises of the com- " 'pany, including the right to take toll, and these were " 'as effectually taken as was the bridge itself. Hence, " 'to measure the damages by the mere cost of building " 'the bridge would be to deprive the company of any com- " 'pensation for the destruction of its franchises. The " 'latter can no more be taken without compensation " 'than can its tangible corporeal property. Their value " 'necessarily depends upon their productiveness. If " 'they yield no money in return over expenditures, they " 'would possess little, if any, present value. If, how- " 'ever, they yield a revenue over and above expenses, " 'they possess a present value, the amount of which de-

"'pends, in a measure, upon the excess of revenue.
"'Hence it is manifest that the income from the bridge
"'was a necessary and proper subject of inquiry before
"'the jury.'

"So, before this property can be taken away from its "owners the whole value must be paid; and that value "depends largely upon the productiveness of the prop- "erty, the franchise to take tolls."

And at page 337 the following language is used:

"Whatever be the true value of that which it takes "from the individual owner must be paid to him before "it can be said that just compensation for the property "has been made. And that which is true in respect to a "condemnation of property for a post-office is equally "true when condemnation is sought for the purpose of "improving a natural highway. Suppose, in the im- "provement of a navigable stream, it was deemed essen- "tial to construct a canal with locks, in order to pass "around rapids or falls. Of the power of Congress to "condemn whatever land may be necessary for such "canal, there can be no question; and of the equal neces- "sity of paying full compensation for all private prop- "erty taken there can be as little doubt. If a man's "house must be taken, that must be paid for; and, if the "property is held and improved under a franchise from "the State, with power to take tolls, that franchise must "be paid for, because it is a substantial element in the "value of the property taken. So, coming to the case be- "fore us, while the power of Congress to take this prop- "erty is unquestionable, yet the power to take is subject "to the constitutional limitation of just compensation.

"It should be noticed that here there is unquestionably "a taking of the property, and not a mere destruction. It "is not a case in which the government requires the re- "moval of an obstruction. What differences would exist "between the two cases, if any, it is unnecessary here to "inquire. All that we need consider is the measure of "compensation when the government in the exercise of "its sovereign power, takes the property.

"And here it may be noticed that, after taking this "property, the government will have the right to exact "the same tolls the navigation company has been receiv- "ing. It would seem strange that, if by asserting its "right to take the property, the government could strip "it largely of its value, destroying all that value which "comes from the receipt of tolls, and, having taken the "property at this reduced valuation, immediately pos- "sess and enjoy all the profits from the collection of the "same tolls. In other words, by the contention this ele- "ment of value exists before and after the taking, and "disappears only during the very moment and process of "taking. Surely, reasoning which leads to such a result "must have some vice, at least the vice of injustice."

See also page 343, where, in speaking of value of franchises the Court uses the following language:

"But this franchise goes with the property; and the "navigation company, which owned it, is deprived of it. "The government takes it away from the company, what- "ever use it may make of it, and *the question of just com- "pensation is not determined by the value to the gov- "ernment which takes, but the value to the individual "from whom the property is taken;* and when by the tak-

"ing of the tangible property the owner is actually de-
"prived of the franchise to collect tolls, just compensa-
"tion requires payment, not merely of the value of the
"tangible property itself, but also of that of the fran-
"chise of which he is deprived."

Tested by these authorities can it be said that there is any error in the ruling of the Court allowing this defendant on cross-examination to show the existence of a mill on the tract of land of which this was a part? Even if the defendant had not been the owner of the mill, if it had been on the adjacent property of a stranger, it would have given value to the piece of land sought to be condemned. If that portion of its land were to be sold at auction, it would bring more by reason of the neighboring mill, because the purchaser in estimating the value of that piece of land would take into consideration the existence of the mill. The mill as shown by the evidence (Record, page 547) is a large one and is necessary to the profitable use of the lands sought to be condemned for the purpose of raising sugar cane which is the most valuable use to which the lands could be put.

Without further elaboration we submit that there is no error in the ruling complained of.

ASSIGNMENTS NUMBERED 2, 3 AND 4.

(Assignment of Errors, Record 817.)

These assignments of errors are upon all fours with assignment number one, the first or number two relates to the exception taken to the ruling upon an objection practically identical with that just considered, made to

the following question: "And that it stands now where "it stood on the 6th day of July, 1901?" The witness, after objection, ruling and exception, answered: "Yes sir." (Bill of Exceptions, Record 547.)

Assignment number three relates to the exception taken to the ruling upon an objection also practically identical with that set out in number one, made to the following question: "What was the size, Captain, of that mill?" The witness, after objection, ruling and exception, answered, "It is a large mill."

(Assignment of Errors, Record 817. Bill of Exceptions, Record 548.)

Assignment number four relates to an exception taken to a ruling upon an objection made to the following question: "How far is this Halawa Valley that you have "testified about in your first answer that I asked in re- "gard to it from the land in question—the nearest por- "tion of the land in question?" This question was objected to in the following language: "Mr. Dunne. 'I "'object to that on the ground that it is wholly imma- "'terial, and not proper cross-examination, and not "'addressed to any subject-matter to which the witness's "'attention was called on the examination in chief; and "'upon the additional ground that he might as well be "'asked how far Paris is from this piece of land.'" To which the Court ruled as follows: "The Court. 'That "'might be but the Court will allow him to answer how "'far Halawa Valley is from this land.'"

(Assignment of Errors, Record 818. Bill of Exceptions, Record 548.)

The whole substance of the testimony given, as stated in the assignment of error, is as follows: "The witness. 'I

"'should say about a mile and one-half, or a mile and one-
"'quarter,—that is by the road. I do not know, only
"'approximately, over how much country down there
"'adjoining this land the Honolulu Plantation Com-
"'pany's property extends; approximately, I should say
"'that it extends over 5,000 or 6,000 acres, and includes
"'the land surrounding this land; I think Halawa Valley
"'is included in the Honolulu Plantation property; I
"'pass through it.'" It is hard to see how the testimony is in any way open to objection. Can it be that there was prejudicial error in permitting defendant to show how far away from this land "Halawa Valley," concerning which there was testimony in the record, was located. The objection was based upon the proposition heretofore stated, that the whole inquiry must be confined rigidly to the four corners of the particular piece of land that the government was taking away from the defendant and therefore that it was just as immaterial for the defendant to show the existence of a water supply owned by it and capable of being used for the irrigation of this portion of its land as it would be to show the existence of a water supply in the City of Paris existing there for the purpose of supplying the citizens of that metropolis with drinking water. We apprehend that the difference is marked. In one case the purchaser, in considering the value of this portion of land, which admittedly required water for the profitable growth of sugar-cane, would naturally ask where the water-supply was coming from. It would be among the first questions that an investor would put when making an inspection of the land with a view to purchasing defendant's leasehold interest. Upon

looking over the ground he would ask, "Where is your water supply, let us examine it?" and the representative of the defendant and the investor would then proceed to the Halawa Valley and inspect its water resources.

The witness had testified on direct examination that on July 6, 1901, there was no natural source of water supply on that land; and, as to an artificial source of water supply, there was only one small artesian well. (Record 541, 545.) The inference was sought to be given that there was no adequate available water-supply for use in connection with the land in question for purposes of irrigation.

We submit that on cross-examination it was proper to ask how far away an abundant supply of water was situated and that the answer shows no error prejudicial to the plaintiff in error.

ASSIGNMENT NUMBER 5.

(Assignment of Errors, Record 819. Bill of Exceptions, Record 575.)

This assignment stands on a different footing from the preceding one, but is equally lacking in any semblance of prejudicial error. The full substance of the proceedings as alleged by plaintiff in error in its assignment of errors is as follows:

"Q. 'Now Mr. Pratt how is this return made up; what "'kind of a return is that under the law?' Mr. Dunne. "'I object to that on the ground that it is a double ques- "'tion.' Mr. Silliman. 'I will divide it.' The Court. 'Let "'us hear what Mr. Pratt says.' Mr. Dunne. 'We ex- "'cept.' The witness. 'It is made under the head aggre-

"'gate value of plantations. It is under that head—a "'business for profit.'"

The Court in its discretion, perhaps to save time, directed the witness to answer the question as asked without waiting to have it divided, in this we cannot believe that plaintiff will seriously contend that there was prejudicial error especially in view of the fact that the witness was his own. It was a matter resting in the discretion of the Court and plaintiff in error could not have been prejudiced by the ruling.

ASSIGNMENT NUMBER 6.

(Assignment of Errors, Record 820. Bill of Exceptions, Record 585.)

Assignment number 6 is based upon an exception taken to the ruling of the Court upon an objection made to the following question, "Now Mr. Archer do you know what "that land is capable of yielding in sugar?" which question was asked by defendant upon cross-examination of a witness called by plaintiff for the purpose of proving the value of defendant's leasehold interest. The witness had testified on his direct to his opinion of the value of defendant's interest in answer to a hypothetical question put to him by counsel for plaintiff, in and by which he was told to take into consideration certain alleged facts, as for instance, the non-existence of a mill for the grinding of cane and the alleged want of an adequate source of water supply on the particular piece of land together with the alleged circumstance that no crop of cane had been produced upon the land, but that it might be used to raise cane just as it might be used to

raise any agricultural product. In connection with such assumed situation the witness had taken into consideration by instruction from counsel for plaintiff his own knowledge of the characteristics of the land, and thereupon under such assumed situation testified that a certain sum per acre would be the fair market value of the leasehold for the purchase of it outright. (Record 584.)

It appears, upon the Record (See pages 583-584), that the witness had assumed that the land might raise cane, and had also taken into consideration his knowledge of the land. In view of this testimony given upon the direct examination of this witness can it be said that there was anything illogical or improper or irrelevant in asking him upon cross-examination if he *knew* what the land was capable of yielding in sugar? It cannot be that this exception is seriously urged. The witness was called as an expert to testify to the value of defendant's leasehold interest the rent for which was payable in sugar, and based his knowledge of value upon what he believed the land would yield in sugar and a liberal latitude is always allowed in the cross-examination of such a witness.

If there were any doubt about it the witness's answer, which is set out in the Assignment of error, makes it perfectly clear that the question was one that he could answer and that it had a direct bearing upon the facts necessarily considered by him in forming an opinion as to the value of the leasehold interest. He testified that the land was good for cane, and where it was good would yield nine to ten tons per acre.

A person buying the land would naturally have taken into consideration what it was capable of yielding in

sugar when estimating its worth in the market. Such a person would have considered whether it was good or bad land, well or ill adapted to the raising of cane, and would have estimated what it would probably yield in tons of sugar per acre. This is exactly what the witness did. His answer shows it. He said: "Where it is good "land it will yield nine or ten tons per acre. This land "is good for cane." (Record 585.)

It is submitted that there was no error prejudicial to the plaintiff in the ruling of the Court.

ASSIGNMENT NUMBER 7.

(Assignment of Errors, Record 821. Bill of Exceptions, Record 587.)

Assignment number seven is based upon an exception taken to the overruling of an objection to the following question, "Do you know whether the Honolulu Planta- "tion Company had on the 6th day of July, 1901, a water "supply that was immediately available to the land in "question?"

The witness in answering the hypothetical question as to the value of defendant's leasehold interest upon his direct examination had assumed that there was no apparent source of water supply except a single artesian well, said to be brackish in character and situated within the boundaries of the particular portion of the defendant's plantation that was sought to be taken. (Record 584.) The question objected to was asked for the purpose of ascertaining whether the witness did not in fact know of another ample water supply available for use in irrigating the lands whenever required. (The Court will

remember that he had been told by plaintiff and the record shows that he did assume to use his own knowledge of the land in answering plaintiff's hypothetical question. Record, page 584.)

Certainly unless defendant could be restricted rigidly to the four corners of the exact portion of its plantation sought by the government, the question was permissible on cross-examination of a witness called as an expert to prove value at the instance of the petitioner. An intending purchaser would have made close inquiry as to the existence of an available water supply. (See discussion and authorities cited under assignments numbers 1 and 4, pages 15-35, supra.)

We submit that there was no error in the Court's ruling.

ASSIGNMENT NUMBER 8.

(Assignment of Errors, Record, page 822. Bill of Exceptions, Record, page 588.)

Assignment number eight is on all fours with assignment number seven. It is really a continuation of the same inquiry. The question was, "What was the extent "of that water supply?" The objection was, "I make the "same objection that we are getting outside of the land "in controversy." The answer was, "I don't know ex- "actly how much, how many gallons of water would be "pumped by those two pumps at Halawa; there is one "big pump; approximately about 10,000,000 gallons more "or less, and the other pump seven more or less in the "other pump."

ASSIGNMENT NUMBER 9.

(Assignment of Errors, Record, page 822. Bill of Exceptions, Record, page 588.)

Assignment number nine is based upon an exception taken to the order of the Court refusing to strike out the above answer. The motion was made in the following language: "Mr. Dunne. 'I move to strike out this tes-
"'timony on the ground that it appears from his answer
"'that this alleged water supply which is not on the land
"'but so-called 'immediately available' whatever that
"'means, springs from somewhere in the Halawa Valley;
"'it goes back to the old thing that your Honor has ruled
"'out heretofore—trying to fix the value of this land by
"'something else.'" The Court ruled as follows: "The
"Court. 'Immediately available to this land, that is the
"'question, and that is what the Court ruled on; if it is
"'immediately available to this land they can prove it.'"

The water supply in the Halawa Valley, as shown by the record (Record, 549) is only a mile and one-half away from the land sought to be condemned. The witness had placed a certain valuation upon the leasehold interest sought to be condemned upon the misleading assumption that the only apparent source of water supply upon it was the single artesian well brackish in character. Now, if the defendant's property could be taken from it on any such false assumption of the real situation, and, moreover, it could be estopped from showing by inquiry on cross-examination the true situation and condition of the property and the surroundings, is it not clear that the jury would be given a very wrong impression of the real usefulness and value of the defendant's leasehold inter-

est? Is it not equally clear that such property would thereby be taken from the defendant without payment of "just compensation" therefor? That there was but a mile and one-half away from that portion of defendant's land an ample water supply belonging to it, and consisting of a flow of upwards of 17,000,000 gallons, as shown by the witness, was a very important circumstance for the consideration of an intending purchaser. Without an available water supply for the purpose of irrigating the land taken it would be without any value. But, in view of the fact that there was that water supply there and imediately available for such use, the land was of great value, of far greater value, as we believe than the amount of the verdict returned by the jury. Surely, then, the defendant had a right on cross-examination to prove its existence. In the language of Mr. Justice Brewer, would not the constitutional provision consist more in sound than in substance if defendant were precluded from doing so? Would not reasoning which would lead to such a result have some vice, "at least the vice of injustice"? (See also discussion and citations under Assignment No. 1.)

It is submitted that there was no prejudicial error in the ruling complained of.

ASSIGNMENT NUMBER 10.

(Assignment of Errors, page 823. Bill of Exceptions, page 589.)

Assignment number ten is on all fours with the foregoing. The question asked on cross-examination of the same witness was, "Do you know whether there is a flow-

" ing stream immediately available for use upon this land " within the lines of the Honolulu Plantation Co.?" The objection was as follows: " Mr. Dunne. ' I object to that " ' on the grounds heretofore stated, and as going out- " ' side of the land in controversy.' The Court. ' If it is " ' immediately available to this land the witness can an- " ' swer the question.' " After exception the witness answered, " I do."

This is fully covered by the discussion under Assignments Nos. 1, 4, 7 and 9, supra.

ASSIGNMENT NUMBER 11.

(Assignment of Errors, Record page 824. Bill of Exceptions, Record page 589.)

Assignment number 11 is based upon an exception taken by plaintiff to the ruling of the Court upon an objection to the following question asked on cross-examination of said witness: "Well now, assuming that the " land was in the same condition on the 6th of July, " 1901, and considering the situation, and the uses it " might be put to, and the improvements put upon it, the " plowing that had been done,—all of its usefulness, the " whole property of the Honolulu Plantation Company, " that is available for use in connection with that land, " assuming those things, what do you say as to the value " of the leasehold interest? "

The question was objected to upon the ground that it was incompetent, an incompetent hypothetical question, that it involved matter not established by any evidence in the case. The Court ruled as follows: " Answer the question." But before the witness did answer the ques-

tion the reference to the whole plantation was stricken out. (Record 590.) The difference between this question and the one asked by counsel for plaintiff is this, counsel for plaintiff limited the witness's attention by assumption stated to him to a false situation, or at least to a situation but half told. The witness was for practical purposes made to assume that there was no mill and no water supply available for use in connection with the leasehold. Now when counsel for defendant, on cross-examination of this witness, assumed nothing but told him to take the situation just as it was and put a value on the lease, can it be that there was any error in permitting him to do so? Certainly on cross-examination this was a legitimate inquiry of a witness called by plaintiff. A wide latitude is always allowed on cross-examination of an expert called to prove value.

3 Jones Evidence, sec. 391.

ASSIGNMENT NUMBER 12.

(Assignment of Errors, Record 825. Bill of Exceptions, Record 598.)

Assignment number 12 is on all fours with assignment number 5. It was a matter resting in the Court's discretion; moreover, counsel stated that he had no objection to the latter part of the question, which, as shown by the answer of the witness, was the only part that the witness attempted to respond to.

We submit there was no error in the ruling.

ASSIGNMENT NUMBER 13.

(Assignment of Errors, Record 826. Bill of Exceptions, Record 599.)

Assignment number 13 cannot be seriously urged by counsel for plaintiff. The question was, "Do you know the yield of the Halawa Valley?" The answer was, "I do not." The question was perfectly proper, but if it was not proper the answer of the witness discloses no prejudice.

ASSIGNMENT NUMBER 14.

(Assignment of Errors, Record 827. Bill of Exceptions, Record 601.)

This assignment is based upon an exception taken to a ruling of the Court sustaining the objection of defendant to a question asked by counsel for plaintiff of the witness, F. W. Thrum, calling for his opinion as to what he would be *willing to pay* for the leasehold. The witness had testified that he was a surveyor and had expressly stated, as appears on the face of the Record (page 597) as follows: "I do not consider that I have any knowl- "edge of the value of real estate and leaseholds in and "about Pearl Harbor and that vicinity." The Court held that in view of the testimony of the witness to the effect that he was unable to express an opinion as to the value he was not an expert and his opinion could not be taken.

In this ruling the Court certainly did not abuse its discretion. As the Court said he was a surveyor and knew the land, but plaintiff could not prove by him the value of the land, unless he knew something about it.

"He said he did not know anything about it." (Record, page 597.)

We submit there was no error in the ruling.

ASSIGNMENT NUMBER 15.

(Assignment of Errors, Record, page 827. Bill of Exceptions, Record, page 602.)

Assignment number 15 relates to a ruling of the court striking out a certain statement of the witness as to what he had done on the lands of an adjacent plantation in the year 1895, six years prior to the trial. The whole gist of the witness's testimony was to the effect that his report as to what land was available for raising sugar cane in a certain field on an adjacent plantation was accepted by the manager of that plantation. The evidence was attempted to be taken on redirect examination, and counsel for defendant objected to it on the ground that it was not proper re-direct, the Court struck it out on the ground that it was immaterial. The evidence was manifestly intended to bolster up the qualifications of the witness, and the Court held that it was immaterial for the witness to show what he had done at that time on other lands and how his report had been used. The whole matter was one within the discretion of the Court. It only went to show the qualifications of the witness to express an opinion as to the quality and value of the land sought to be condemned, upon which, because of the witness's unequivocal declaration that he was not an expert, the Court had already ruled that he was incompetent to testify.

ASSIGNMENT NUMBER 16.

(Assignment of Errors, Record 828. Bill of Exceptions, Record 622.)

This assignment is based upon an exception taken to a ruling of the Court overruling an objection of plaintiff to the following question asked on cross-examination of the witness J. A. McCandless called by plaintiff: "Q. 'What "'is the value set on that leasehold interest of 142 "'acres?'" The question was objected to on the ground that the records of the Court showed that the controversy as respecting that leasehold interest had been amicably settled as between the Oahu Sugar Company (the owner of the leasehold interest) and the government, that it was not proper cross-examination, that it was not directed to any matter testified to by the witness in chief, and had no materiality upon the inquiry, the Court ruled as follows: "The Court will not rule out that testimony, "but you can meet it, if it is met at all, because the "Court will not rule out any testimony that has a ten-"dency to explain any facts that are introduced before "the jury." The answer was that the company had placed a valuation of $200,000 "on 142 acres on Ford Island *that I have been testifying about.*" (Record, 622.) A reference to the record (page 620) will disclose the following as a part of the testimony on the direct examination of this witness: "A. 'It is a hard thing to put a "'valuation upon that, I still stick to my original state-"'ment—I do not think it is worth any more to the com-"'pany than they had to pay for it. I want to explain "'my answer. To put a figure per acre for the market "'value of that leasehold interest, as it stood July 6th,

"'1901, I should say $15 or $20 an acre—I say $15 or $20
"'for all that was cane land. Now I would like to ex-
"'plain why I made that statement. I am a Director of
"'the Oahu Sugar Company, that is on Ford Island and
"'also on the Peninsula, and, about a year and a half or
"'two years ago, the company of which I am a Director
"'secured a lease; the Oahu Sugar Company leased Ford
"'Island and the Peninsula from the Ii Estate for $12.50
"'per acre per annum; and there is no comparison be-
"'tween the soil on Ford Island and the Peninsula with
"'this piece of land. I just want to make that state-
"'ment that the Oahu Sugar Company considered when
"'we leased that that we had given every cent it was
"'worth to the Oahu Sugar Company, and they would
"'not give any more for it. I was one of the Board of
"'Directors of the Oahu Sugar Company at the time,
"'and I know its business transactions, and I was pres-
"' ent when these transactions were had and I am speak-
"'ing from my own knowledge.'"

Now on cross-examination he admitted that proceedings to condemn a portion of the Ford Island leasehold that he had been testifying about were instituted by the government. His attention was called to the answer of the plantation alleging a valuation of 142 acres out of that leasehold, and, after identifying the signatures of the officers of the corporation, he was asked the question objected to, namely, "What is the value set on that leasehold interest of 142 acres?" and he answered, "I see "from that answer of the Oahu Sugar Company that they "place a valuation of $200,000 on the 142 acres of Ford "Island *that I have been testifying about.*" Clearly this was

proper cross-examination, it was the valuation fixed by his Board of Directors on the very leasehold interest he had been testifying about. He had said on his direct that he knew that the Board of Directors considered when they agreed to pay $12 per acre per annum for it, that they had given every cent it was worth to them. The inference was that the Ford Island leasehold was not considered to be of any value by the Board of Directors, and therefore that the leasehold of the Honolulu Plantation was worth nothing. He said that he referred to the Oahu Sugar Company lease as a reason for his testimony that the Honolulu Plantation Company's lease was worth no more than the rent they paid. When he was confronted by the sworn answer of that corporation he was naturally a discredited witness. Can there be any doubt of the defendant's right to so discredit him? It is for just such purposes that the right of cross-examination exists and has been recognized as the most powerful weapon for the ascertainment of truth and the real worth of a witness's testimony. Greater latitude is allowed, too, on cross-examination of a witness testifying to his opinion of value.

3 Jones Evidence, secs. 391, 826.

We submit there was no prejudicial error in this ruling.

ASSIGNMENT NUMBER 17.

(Assignment of Errors, Record, page 830. Bill of Exceptions, Record, page 625.)

This assignment is on all fours with assignments of error numbers 5 and 12. The objection was that the question involved three separate and distinct questions.

The matter was one in the discretion of the Court, and there was no prejudicial error in the ruling complained of.

ASSIGNMENT NUMBER 18.

(Assignment of Errors, Record, page 831. Bill of Exceptions, Record, page 625.)

This assignment is based upon an exception taken to a ruling upon an objection to a question, "Why not?" The witness, Mr. Low, defendant's manager, having made a statement to the effect that sugar had not been grown on this land by the Honolulu Plantation Company, was asked, "Why not?" the answer was that the plantation was a new plantation and that the company had not been able to get out to this land, the further statement was made that all new plantations must start from the mill and work out.

The question was asked only incidentally to permit the witness to make an explanation of his prior answer. Clearly there was no prejudicial error in this; it was a mere incident of the trial and of the taking of the testimony of defendant's manager.

ASSIGNMENTS NUMBERED 19 AND 20.

(Assignment of Errors, Record, pages 831-834. Bill of Exceptions, Record, pages 627-629.)

Assignments numbered 19 and 20 cover the same identical matter and the whole is embodied in Assignment number 20. The question was answered before an objection was made. After answer a motion was made to strike out the testimony of the witness as to the value of

the leasehold interest of the Honolulu Plantation Company on the ground that it is settled law that what it might be worth to the Honolulu Plantation Company was not a fair test of the market value. The Court refused to strike it out. Counsel for defendant then asked the witness what the market value was, to which the witness answered as follows: "That is what I said. I have not "made up my mind. I think it ought to be $250,000 or "$300,000." The Court then asked the witness, "Is there any difference between the value and the market value?" to which the witness answered, "Yes, sir. The Honolulu "Plantation Company, it might have a greater value to "the Honolulu Plantation than to any one else, if it were "put in the market there would be three bidders for this "land—the Ewa Plantation, the Oahu Plantation and "the Honolulu Plantation—but it has a distinct value to "the Honolulu Plantation." Counsel for plaintiff then made a motion in the following language: "To save the "rights of the government I move to strike out the tes-"timony of the witness relative to the value of this lease-"hold to any particular individual, to the Honolulu "Plantation Company, on the ground that compensation "is the market value and not the value which property "may or may not have to a particular individual." The Court: "No, the Court will not strike it out."

It was what should constitute "just compensation" for that *portion* of the defendant's *plantation* and not what might be the "market value" of it as a distinct, separate, marketable lot of ground that was in issue. But, while this is true, the parties were nevertheless restricted to proof of market value, and, so the subsequent page of the

record will show, the government had the fullest benefit of the rule of "market value" as a test of "just compensation."

Before considering the law we beg to call the Court's attention to some of the evidence that had already been given. Capt. White (Page 549 of the Record) testified that the Honolulu Plantation Company's property extended over 5,000 or 6,000 acres surrounding the land in question. The plantation was started in May, 1898 (Record 625). The corporation exhibit introduced generally by counsel for plaintiff showed that the company had spent for cost of mill, railroad, cars, reservoirs, waterways, flumes and tressels, growing crops, machinery, tools and implements etc., $2,264,299.92. (Record 613.)

Mr. Low, manager of defendant's plantation, testified (Record, page 625) that the plantation had about 8,000 acres of land of which 5,000 were suitable for cane around and adjoining the land sought to be condemned. He furthermore testified that the plantation had a water supply immediately available for the land, situated in the Halawa Valley and consisting of artesian wells and flowing streams. He also testified that the plantation lands extended 5 miles in one direction from the land sought to be condemned and 2½ miles in the other. (Record 626.) It is easily demonstrated; indeed, it is perfectly obvious, that a comparatively small parcel of land adapted to the growth of sugar cane would not be of very great value standing alone; but to a company that has the equipment, mill, water supply and all things necessary to make the land valuable for the growth of sugar cane, it would have distinct value as testified by Mr. Bolte. And

right here we beg to call the Court's attention to the fact that Mr. Bolte was a witness peculiarly well qualified to give an opinion upon the value of the defendant's property which the government was seeking to condemn. His business was that of looking after sugar plantations, ranches and property of other people. He had been engaged in business connected with the sugar industries in the Hawaiian Islands 23 years. The character of his business in regard to sugar plantations was that of going on the plantations, looking around and advising with the manager and people as to the financial portion of the business. He had been doing it for 23 years on the plantations of Waimanalo, Kahuku and Heeia. He was, at the time of the giving of his testimony, Chairman of the Tax Appeals Court for the Island of Oahu, on which the plantation was situated. His duty as such Chairman of such Board was to determine the value of property that was taxed and the value of the different interests. He was familiar to a certain extent, with the value of the lands of the Island and knew the land that the Government was seeking to condemn, and he testified that he thought from the examination he had made and the experience he had had in the land business that he was able to state the value of the leasehold interest. (Record, pages 627-8.) When, therefore, this witness said that this piece of land had a *distinct* value to this defendant, that statement and its bearing on the question of "just compensation" was entitled to serious consideration.

The Supreme Court in Monongahela Nav. Co. v. U. S., 148 U. S., at page 343, in considering an offer to prove overruled by the trial court (set out on pages 318 and 319),

said: "The question of just compensation is not deter-
"mined by the value to the government which takes, but
"the value to the individual from whom the property is
"taken; and when by the taking of the tangible property
"the owner is actually deprived of the franchise to col-
"lect tolls, just compensation requires payment, not
"merely of the value of the tangible property itself, but
"also of that of the franchise of which he is deprived."

In this case, as has been pointed out, the plantation had spent more than $2,000,000 in building a mill, creating a water supply, obtaining equipments, etc. It had 8,000 acres of land or 5,000 acres of cane land. The government was taking 561.2 acres of land, containing 342 acres of cane land. The portion of land taken was about 1-14 of cane land as well as 1-14 of the whole. It might well be argued, in view of the situation, and it is the firm belief of defendant's manager and his counsel that the market value of the portion taken was no proper test of the real value thereof or of the just compensation to which defendant was entitled. But, as already stated, the government did, in fact, have the full benefit of the rule as will be more fully pointed out hereafter.

The Supreme Court of Pennsylvania in Montgomery County v. Schulkill Bridge Company, 110 Pa. 54, 59, which decision is quoted from and cited by the Supreme Court in Monongahela Nav. Co. v. U. S., page 329, uses the following language: "The principle was invoked by
"the defendant that the true measure of damages was
"the market value at the time of the taking, * * *
"The principle is well enough, but it has no application
"to the facts of this case. The property taken was of

"a peculiar character and can hardly be said to have "a market value. It was a bridge and the corporate "franchise of the company owning it. There are no sales "of such property by which it can be compared, and a "market value, in the fair sense of the term, ascertained. "One bridge may be of little value, because unproduc- "tive; another of no greater size and cost, by reason of "its location may be extremely valuable."

There is no doubt that this land would be worth more to the Honolulu Plantation ompany than to any of the other plantations in the vicinity, for it is situated within the boundaries of that plantation and can be easily used by that company. A segregated piece of land of the character of the portion of land in question could not be worked to advantage by a plantation whose nearest border by the usual course of travel, was five miles or more distant from it; and it necessarily would be worked at still greater cost by another plantation situated still further on.

If it is true that this piece of land was worth more to the defendant than to any one else and that the defendant is entitled to the value of its property before the government can take it by the extraordinary power of eminent domain, then to confine the defendant to proof of the value not to it, but according to a price that it might bring at an assumed public sale would be to deprive the defendant of just so much compensation. 148 U. S., 328, 329.

Let us put the same idea in the light in which it must have presented itself to the mind of Mr. Bolte, namely, that if the portion of land condemned were to be sold

under the hammer, the Honolulu Plantation Company as a bidder in competition with the adjoining plantations would have to pay for it but a little more than the next highest bidder might have offered for it. In other words, if it was worth $200,000 to Ewa, $250,000 to Oahu and $400,000 to the Honolulu Plantation, on being offered for sale it would not bring $400,000, but would only bring a little more than $250,000, that being its value to the Oahu Plantation Company. That is the figure at which competitive bidding would stop. But in the language of the Supreme Court in the decision quoted, to confine this defendant to such proof as that would be to deprive it of just so much compensation.

We believe that we have demonstrated that the value of this portion of defendant's plantation and the just compensation that, under the constitution, it was entitled to receive should have been estimated not at what it would bring at a public sale (the test ultimately laid down by the Court Record 717), but by what it was really worth, according to the testimony of impartial witnesses, to the defendant plantation itself.

See also, S. & N. W. Ry. Co. v. C. & E. R. R. Co., 112 Ill., 590, 605-606-607;

L. S. & M. S. Ry. Co. v. S. C. & W. I. R. Co., 100 Ill. 21-33;

2 Jones on Evidence, page 865;

2 Lewis Em. Dom. (2nd Ed.) 1052;

St. L. K. & A. Co. v. Chapman, 16 Pac. 695, 696.

We quote the following from St. L. K. & A. Co. v. Chapman:

"The law does not presume or require impossibilities; "it only demands and requires the best proof under the "circumstances of each case, Where property has a mar- "ket value, the rule is strict, and requires only that value "to be shown; but where it is shown that the property "is without a market value, then the law allows the next "best evidence to be given to ascertain its value. The "property then may be compared with other property. "Its value may be determined by persons who are shown "to be judges, or who have knowledge of the value of "real estate in that vicinity and their opinions may be "given of the value of the property, which, in this case, "was the best evidence it was possible to procure. Some "classes of property always have a market value; other "property, by reason of its location or distance from mar- "ket, or other circumstances is without a market value. "Nevertheless it has a value, though the means of ascer- "taining it are changed where the rule requiring market "value cannot be applied." (16 Pac., 696.)

The Supreme Court of Illinois uses some apt language in the first case cited when considering what constitutes the true measure of compensation for property of this character. The following appears in the syllabus:

"Where property sought to be condemned for a public "use has a market value, and is not devoted to any par- "ticular use, making it more valuable to the owner than "to any one else, such value affords the true measure of "compensation to be paid for it; but when the proof "tends to show the property has no market value by rea- "son of the particular use to which it is being applied, it "is error to instruct the jury that the compensation

"should not be less nor more than its fair market value, "and to refuse all instructions based on the theory that "it has no market value.

"Where, in the nature of things, there can be no mar- "ket value of a piece of property by reason of being used "in connection with and as a part of some extensive busi- "ness or enterprise, its value must be determined by the "uses to which it is applied. In such case the market "value of neighboring lands, differently circumstanced, "may be shown, as throwing some light on the question, "but it falls far short of furnishing a true or adequate "test of the value of the property." (112 Ill., 590.)

And in the opinion (112 Ill., at page 606) the following language is used:

"One of the controverted questions in the case was, "whether as a matter of fact, property circumstanced as "this was, had any market value in that vicinity. We "think the evidence tended to prove it had not, whatever "the weight of evidence may have been on that question. "And as the Court had refused all instructions, with the "exception above mentioned, presenting this aspect of "the case, and had undertaken to instruct the jury fully "with respect to their duty, it should have told them how "the amount of compensation was to be determined if "the proofs failed to establish a market value for prop- "erty situated as that was. This the Court did not do. "In most cases the rule laid down by the Court would be "correct, but there are many instances where, if thus laid "down without qualification, the rule would clearly be "misleading. Indeed, in all cases where a piece of prop-

"erty, by reason of having been applied to a particular "use, has a special value to the owner, the rule announced "by the Court would be improper, and if observed by the "jury, would necessarily lead to an unjust result. It is "claimed by appellant and it will not be denied, that the "evidence tends at least to show that this particular "piece of ground constituted a part of the terminal facil- "ities of appellant's great railway, extending thousands "of miles, and consisting of numerous divisions and "branches. The lot in question is at present and for "years past has been, used in transferring freight to and "from the company's tracks, to the lake, and is accessible "to all the divisions of appellant's road. It is also "claimed by appellant, and the evidence tends to prove "the fact, that no other property in that vicinity so es- "sential and desirable for the purposes of the company's "business can be obtained if that is taken. Now, it is "manifest that by reason of the use to which this prop- "erty is applied, and its connection with the company's "business generally, it has a special value to the company "which it does not have to any one else, and which the "general market value of other property in that locality "not thus circumstanced throws but a little, if any, light "upon, much less furnishes a rule by which to determine "its value. Strictly speaking, the market value of any- "thing is determined by what it would sell for in market "in due course of business, and this is ascertained by "actual sales or offers for like articles. This applies to "land as well as anything else. But the term is some- "times used in a more extended sense, as including the "estimation which well informed persons would put upon

"an article in the absence of a market value, in the strict "sense of that term, and this kind of evidence is always "admissible to show value. We know, as a matter of "common experience, that railway companies rarely, if "ever, sell out their tracks, depot grounds, or other like "property by piece meal. At least such transactions, we "apprehend are of so rare occurence as to afford no evi- "dence of a market price for that kind of property. It "is true in this case, proof was made of several sales of "land in the vicinity of the property in question, desig- "nated by the witnesses as dock property; but none of the "pieces mentioned as having been sold were situated as "the property in dispute is. It is true, the latter like "those, is dock property, but it is something more. It is "a part of a great railroad property, and it is an impor- "tant factor in the handling and transportation of "freight, in the heart of a great city, by the company "owning it. Many illustrations might be given where "property evidently has no market value, but one will "suffice. Take the case of a railroad crossing. The "value of the part of the track taken for such crossing "cannot be ascertained by any reference to market "values, and if determined by the value of the land taken "at customary prices of land in the neighborhood, the "value in most cases would be inappreciable; and yet to "the company who owns the track, it always has a sub- "stantial value, that well-informed, intelligent railroad "men would readily know how to estimate. Where, in "the nature of things, there can be no market value of a "piece of property, by reason of being used in connection "with and as a part of some extensive business or enter-

" prise, its value must be determined by the uses to which " it is applied. While in such cases the market value " of neighboring lands differently circumstanced may be " looked to as throwing some light upon the question, yet " that alone would fall far short of furnishing a true or " adequate test of the value of the property. As was said " in *Railroad Co.* v. *Kirby*, 104 Ill., 345: 'The value of the land " ' consists in its fitness for use, present or future, and be- " ' fore it can be taken for public use the owner must have " ' just compensation. If he has adopted a peculiar mode " ' of using that land by which he derives profit, and he " ' is to be deprived of that use, justice requires he should " ' be compensated for the loss. That loss is the loss to " ' himself. It is the value which he has, and of which he " ' is deprived, which must be made good by compensa- " ' tion.' Substantially the same idea is well expressed " in the English case of *Beckett v. Midland Railway Co.*, " L. R., 3. C. P., 82. It was there said: ' The property is " ' to be taken in *statu quo*, and to be considered with ref- " ' erence to the use to which any owner might put it in " ' its then condition.' This statement we regard as quite " accurate, and it will be observed it fully meets the case " where the property sought to be taken has some special " value to the owner by reason of having adopted some " particular use for it. This might happen on a farm, as " well as in a city or town. For illustration: Suppose the " owner of a farm concludes to go into the dairy busi- " ness, and proceeds to spend several thousands of dollars " on his farm in preparing stalls and sheds for his cows, " and in making suitable preparations for the handling " of the milk and converting it into butter and cheese.

"When the farm is thoroughly fitted up for this purpose "it is very clear it would have a special value to him that "it would not have to any one else unless to some one "who should want it for the same purpose. One who "wanted it for mere farming purposes could not afford "to pay but little more for it on account of its adaptation "to the dairy business; and assuming that was the only "dairy farm in that locality, it is clear there could be no "market value for a farm thus situated, while there "might, and probably would, be a market value for farms "like that adapted for farming purposes merely. Sup- "pose, in the case we have put, a railway company hav- "ing the right to locate its road across this farm, so "locates its tracks as to completely destroy all the im- "provements that have been made in fitting it up for "dairy purposes, but not at all injuring the farm other- "wise. Now, is it not manifest that in such a case to "limit the owner's compensation to the market value of "the land taken, would be grossly unjust and inadequate? "And yet, in principle, we see no difference between the "case suggested and the one in hand. **In condemnation "cases the owner of the property taken is not required to "make any pecuniary sacrifices at all. He is entitled to "whatever the property is worth to him, or any one else, "for any purpose to which it is adapted; but the special "uses or purposes to which it is adapted must be real; "that is, founded on facts capable of proof, and not "merely speculative or imaginary."**

As further illustrative of the principle stated we call the Court's attention to another still more forcible suggestion:

Suppose that in this case the government instead of taking 561.2 acres of defendant's plantation lands, was taking the whole 8,000 acres save the single portion on which the mill, offices, pumping machinery, and so forth, stand. That would take the land and leave the adjuncts. But in leaving the adjuncts and taking the land $2,000,000 worth of property in place would be reduced to a comparatively insignificant valuation. It would be worth no more than what it would bring as second-hand material on a market that probably would have no present use for it.

Can it be possible that any one would seriously urge that such a rule would be within the meaning of the constitutional amendment? Would not this illustration clearly show that such a rule of law would deprive the defendant of its property without just compensation? Would not that safeguard of the citizen against the power of the government be reduced to a matter "more of sound than of substance"? Is there any difference in principle between taking the whole and taking a part on a false and arbitrary basis?

When the record of the trial in the Court below is tested by such authorities as the one last quoted from and Monongahela Navigation Company v. U. S., it will be found, even in the absence of a bill of defendant's exceptions, that defendant is the one that has just cause to complain of the course of the trial in the Court below. At any rate, the record will fully disclose that the plaintiff was not prejudiced by the Court's rulings and charge.

We believe that in this case market value was no just test of what the defendant was entitled to receive for the

taking of this portion of its plantation lands. But even if it were the test, the plaintiff had the full benefit of it. Because of intimations given out by the Court as to what the jury would be instructed at the close of the case, we asked all the witnesses called after the defendant's manager to give the market value only. Moreover, the Court instructed the jury in the following language:

"I have told you that the fair market value of the prop-
"erty (I have not as yet, but will) as that property actu-
"ally stood on July 6, 1901, should be paid for it; and in
"this behalf I charge you that what this property would
"bring at a fair *public* sale, where one party wants to sell
"and another wants to buy may be taken as a criterion of
"its market value."

Moreover, the testimony came within the definition of "market value," as given by all the authorities. It was but one way of fixing that value for which the defendant if it wanted to sell but did not have to, would have been willing to part with its leasehold.

It is submitted without further elaborating upon the subject that there was no error prejudicial to the government in the rulings set out in the foregoing assignments.

ASSIGNMENT NUMBER 21.

(Assignment of Errors, Record 834. Bill of Exceptions, 633.)

This assignment is based upon an exception taken to a ruling made by the Court upon a motion to strike out an answer given to a question which was not objected to when asked nor stated in the record (Record 633), but in

the assignment of errors it is alleged to have been, "What "is the value of the use of the buildings upon the land "for the remainder of your term of the lease?" The grounds of the motion are not stated in the assignment of error, but by reference to the record it appears that after the witness had testified as follows: "Prior to the 6th of "July, 1901, the company had done considerable work "on this land—had fully prepared it for a growing crop "of cane by clearing it of brush and rock, and by double "plowing it; making surveys, laying the land out, plow- "ing it, platting it out to arrive at the manner of water- "coursing it; laying out the watercourses. A portion of "the land was selected as the best available camp site "that there was on that portion of the company's prop- "erty and a temporary camp was built. The value of the "use of the buildings upon that land for the remainder "of the term of our lease was $13,500. I believe the "buildings are worth that to this company, because I do "not believe that there would be a vestige of the build- "ings left at the termination of the lease forty years "from now." The plaintiff made a motion as follows: "Mr. Dunne. 'I move to strike out that testimony; it is "'perfectly apparent from that testimony that it makes "'no attempt to reach the market value; and upon the "'ground that it is illegitimate the value it may be to "'any particular individual as distinguished from the "'market value.'" Upon which the Court ruled: "I will "allow the jury to consider it." (Record 633.)

This testimony was proper from several points of view. In the first place the witness did not expressly limit the value to the defendant. In the second place it is per-

fectly clear that those buildings constituting a laborer's camp out in the middle of the defendant's plantation could not well have had a value to any one else than the defendant. It was the only person or corporation that could possibly have had use for the buildings. Moreover, the testimony was justified by certain questions asked on *re-direct* examination by plaintiff of its witness Archer. He testified against the objections of defendant that in making an estimate of $100,000, as the value of the leasehold, he had allowed $15,000 for the buildings situated on the land in question. In view of this testimony brought out by plaintiff it was entirely proper for the defendant's manager to give *his* opinion of the value of the use of said buildings. Moreover, it was the theory of the plaintiff that the value of the improvements should be separately shown, as appears both by the question asked of Archer on re-direct and by the form of verdict which the plaintiff requested the Court to give to the jury both in this trial and on the former trial, which said form of verdict required the jury to make a separate finding of the value of "improvements." It is also shown by the charge of the Court upon the subject of improvements, which charge was not excepted to by plaintiff but was excepted to by defendant. The Court charged the jury: "And if from "the evidence you shall find that the defendant had any "improvements on that portion of the land covered by the "leasehold interest of the defendant, and which is sought "to be condemned by the United States, which were there "prior to the 6th day of July, 1901, you are to find the "*value of the user* of such improvements to the defendant "for the remainder of the term of the leases, *separate and*

"*distinct* from the value of the leasehold interest itself in "said lands."

Contrast with this the instructions requested by defendant (Record 448).

It was only to meet this contention and theory of plaintiff, and to show to the jury what value defendant's manager placed upon the use of the buildings that had been erected by it *on* the land that the evidence was given. As already point out, the buildings could have no value to any one else than the defendant.

It is submitted that there is no error in the ruling.

ASSIGNMENT NUMBER 22.

(Assignment of Errors, Record 835. Bill of Exceptions, Record 634.)

Assignment number twenty-two is based upon an exception taken to the ruling of the Court permitting the witness Low to go on with an explanation he was making and the full substance of "the evidence so refused to be "striken out" was as follows: "A. 'We have soil sim-"'ilar in the Halawa Valley that we have raised cane on.' "Mr. Dunne. 'I object to this comparison of outside "'soil; he was asked concerning this soil.' The Court. "'He can go on if he will; let us hear it.' Mr. Dunne. "'We except.'"

It does not appear that there was any error in this ruling. It was like the question, "Why not?" the basis of assignment number 18 a mere incident of the trial. It was, on the face of it, but a part of an explanation the witness was making at the time. But even if it had been

brought out by a question that counsel for defendant had asked the witness, or if a motion to strike out the portion of the testimony quoted had been made, the inquiry would have been perfectly proper under the law as stated in Monongahela Nav. Co. v. U. S., 148 U. S., 328, the Court there asks the question: "How shall just compensation "for this lock and dam be determined? What does the "full equivalent therefore demand? The value of the "property, generally speaking, is determined by its pro- "ductiveness—the profit which its use brings to the "owner. Various elements enter into this matter of "value. Among them we may notice these: *Natural "richness of the soil as between two neighboring tracts*—one "may be fertile, the other barren; the one so situated as "to be susceptible of easy use, the other requiring much "labor and large expense to make its fertility available."

It is submitted that there was no error in the proceedings set out in the assignment of error.

ASSIGNMENT NUMBER 23.

(Assignment of Errors, Record page 835. Bill of Exceptions, Record page 636.)

This assignment is based upon an exception set forth in the following proceedings which are set out in said assignment as "the full substance of the evidence": "Mr. "Silliman. 'What was its value on the 6th of July, "1901?' Q. 'To the Honolulu Plantation Company?' "Q. 'Yes, sir.' Mr. Dunne. 'The same objection.' (Not "a proper test of market value.) The Court. 'The same "ruling.' Mr. Dunne. 'We except.' A. '$400,000.'"

A defendant the value of whose property is in issue is allowed greater latitude, subject to cross-examination, in testifying to such value, or what is the same thing, to the damage which he will sustain by reason of the taking of his property or the amount of compensation that he should receive. It is but fair that one whose property is taken at the instance of another should be permitted to state what his loss will be.

We quote the following from Derby v. Gallup, 5 Minn. 119, Gil. 85, 98: "In the course of examination of Griggs "he testified to the value of certain real estate owned by "him, which was objected to by defendant's counsel on "the ground that he had not shown himself competent to "give an opinion as to the value of the property. The "objection was overruled and we think properly. In Joy "v. Hopkins, 5 Denio, 84, it is held that the rule that a "witness cannot, in general, speak of matters of opinion, "does not apply where the value of property is in ques- "tion. Also Lamour v. Caryl, 4 Denio, 370; Brill V. Fla- "ger, 23 Wend. 354; Culver v. Haslam, 7 Barb. S. C., 314, "14 S. & R. 137. From the nature of the case the jury "must ordinarily form their opinion as to the value of the "property, more or less from the opinion of witnesses, "as it would often be difficult, if not impossible, to make "such statement of facts in regard to the value as would "suffice to enable them to form a correct judgment; and "the presumption is that the owner of property is better "acquainted with its value than a stranger. The evil "sought to be prevented by the rule excluding opinions "will rarely prove of serious consequence, in cases of this "nature, from the admission of such evidence." 5 Minn. Gil. 98.

From Hayden v. Albee, 20 Minn., 159, Gil. 143, at Gil., 146, we quote the following language: "The testimony of "the plaintiff as to the value of the ford from the time it "became impassable in consequence of the dam in 1868 to "the time of the commencement of this action was the "testimony of the owner of the ford who had habitually "used the same in hauling crops and wood from one "part of his farm to the other, and who was, therefore, "presumably as well able as any person to estimate the "value of its use, as a ford, the correctness of his esti-"mate being of course subject to the test of a cross-ex-"amination."

In all other respects this assignment is similar to assignment 20, and it is submitted, upon the authorities there quoted, that there is no error prejudicial to the plaintiff in the ruling complained of.

ASSIGNMENT NUMBER 24.

(Assignment of Errors, Record 836. Bill of Exceptions, Record 636.)

This assignment is based upon an exception taken to a ruling of the court upon an objection made by plaintiff in the following language: "I object to that, it is a mere "ambiguous question—a sort of question that would per-"mit almost any sort of an answer, hearsay or other-"wise." No motion was made to strike out the answer given. Manifestly the objection went to the form of the question and not to the substance of the evidence received. It was therefore addressed to the discretion of the Court below. But an examination of the answer will

disclose that there was nothing prejudicial to the plaintiff therein. The witness states that the figures $50,000 set forth in the tax return were a transcript from the company's books showing the cost of three rice plantations the company had purchased. Plaintiff did not move that this testimony be stricken out, and if incorrect that fact could easily have been shown upon cross-examination upon an inspection of the company's books.

ASSIGNMENT NUMBER 25.

(Assignment of Errors, Record 837. Bill of Exceptions, Record 650.)

This assignment is based upon an exception taken to a ruling of the Court upon an objection based upon the ground of irrelevancy taken by the plaintiff to the following question asked of the witness W. R. Castle, called by defendant as an expert: "What knowledge have you of the development of the plantations in that district?" This question was but one of a number of questions asked of the witness as stated at the time for the purpose of showing his qualifications to testify as an expert, it having been shown that the property was a portion of a large sugar plantation belonging to the defendant, and that there were two other plantations in the vicinity, one known as Ewa Plantation and the other as Oahu Plantation. It was entirely competent, as tending to show the qualifications of the witness, to show what knowledge he had of the development of other plantations in connection with his knowledge of the lands of the Honolulu Plantation. The answer was: "I have been identified "with the plantations there—the Ewa more particularly,

"and have known about the development of all of these "plantations, beginning with Ewa and coming around "to the Honolulu Plantation."

Manifestly this was competent evidence tending to show the qualification of the witness to testify as an expert.

ASSIGNMENT NUMBER 26.

(Assignment of Errors, Record 839. Bill of Exceptions, Record 652.)

This assignment is based upon an exception taken to the overruling of an objection made by counsel for plaintiff to the hypothetical question asked by counsel for defendant of the said witness W. R. Castle. The objection was based upon the grounds that the question was irrelevant, incompetent and immaterial, not justified by the evidence and without foundation in that there was no evidence that the witness knew what was the market value on July 6th, 1901. The objection does not point out in what respect the question was not justified by the evidence, and we are at an utter loss to know what counsel meant thereby. It was admitted by both sides that the plantation had a thirty-nine years' lease, that seven years' rental had been paid, that 32 years was on a basis of 3½ per cent of the sugar produced, together with the payment of taxes, that the lease covered other lands in addition to the portion sought to be condemned, and that there was a minimum rental provided for in the lease. The defendant's manager and surveyor had testified that there were 342 acres available for planting in the land sought to be condemned. (See hypothetical question put

by plaintiff to the witness Archer, Record 584; also hypothetical question put by plaintiff to witness L. L. McCandless, Record 595; lease from Bishop Trustees to the Honolulu Sugar Company, Record 603, 608; testimony of Low, Record 631-641.) Statement showing that there were 342 acres of cane land, put in evidence by plaintiff. (Record 641.) And map showing the exact acreage and location of all cane land claimed by the defendant, on file in the records of this Court sent up from the Court below, the same having been identified as correct. (Record 646-648-663, 924, and map at 925.)

The law does not require that a hypothetical question should embody the theory of opposite counsel. It is only necessary that it be fair and fairly supported by the facts proven by the party asking it.

Western Coal M. Co. v. Berbrach, 94 Fed. 329-332;
2 Jones on Evidence, sec. 373.

(It now transpires, upon an examination of plaintiff's brief, that the point of the objection was that the witness was not qualified to express an opinion.)

As to that ground of the objection, namely, that the witness was not qualified to give an opinion, we call the Court's attention to the following facts testified to by the witness before said hypothetical question was put to him. He was an attorney-at-law; had something to do with investments, investing for people; the major part of his business was office business; had been engaged in it since 1876; he had been in business here; had followed it continuously and did a good deal of that business all over the country; he was very well acquainted with the lands at Pearl Harbor; was well acquainted with the value of

land about Pearl Harbor; he believed that he knew where the land sought to be condemned was situated and had been over it in parts; the boundaries had been pointed out to him. Without calling the Court's attention to further testimony showing qualification, it is submitted that the witness had shown ample qualification to testify. (Record, 649-652.)

In this connection and because there are a number of assignments of error based upon similar objections, we call the Court's attention to two authorities:

St. Louis K. & A. Ry. Co. v. Chapman, 16 Pac. Rep., 695, 697.

Montana R. R. Co. v. Warren, 137 U. S., 348-352.

The former holds that where there is no market value witnesses who have known the land for many years and have testified that they know the value of real estate in the vicinity will be permitted to testify to the value of the portion taken. The following language will be found on page 697:

"In Railway Co. v. Paul, 28 Kan., 821, Judge Brewer, "now Justice Brewer, speaking for the Court, says: "'While on the other hand the value of real estate, espe- "'cially in localities where there are few changes in "'property are not so absolutely certain, and cannot be "'determined with absolute exactness, and in respect to "'them the testimony of witnesses partakes largely of "'the nature of opinions, yet, from the necessities of the "'case, it has come to be recognized that such testimony "'is competent. It is the best, that in the nature of "'things, can be obtained; for a description by a witness "'of the locality of any given tract, its improvements and

"'surroundings, would ordinarily throw little light upon "'the question of its value. So many things enter into "'and effect such value that a witness would be unable "'to describe them all, or even to comprehend them all "'fully. Hence it has become pretty generally estab- "'lished that a witness who testifies that he is acquaint- "'ed with the value of real estate in the locality may "'give his opinion as to the value of any particular tract.' "See, also, Railroad Co. v. Stanford, 12 Kan., 380; Rail- "road Co. v. Allen, 24 Kan., 33."

From Montana R. R. Co. v. Warren, we beg to quote the following language found on pages 352 and 353:

"The assignments urged are three in number, first that "the verdict indicates passion and prejudice. Obviously "there is no foundation for this. If the testimony ad- "mitted by the trial court was competent, there was "ample foundation for the verdict. If the witnesses were "to be believed and their testimony was competent, the "verdict was not excessive; and the second of the three "points presented to the Supreme Court, which was that "the evidence was not sufficient to justify the verdict, "thus fails. There remains for consideration but a sin- "gle point—that there was admitted in evidence on the "trial the opinions of witnesses as to the value of land, "which were not based upon the sale of the same or "similar property, and were not therefore, the opinions "of persons competent to so testify. It appears that the "land taken was a strip running through a mining claim, "which had been patented and belonged to the defendant "in error. The claim adjoined the Anaconda mining "claim, which had been developed and worked, and dem-

"onstrated to contain a vein of great value. The claim "in controversy had been developed so far as to indicate "that possibly, perhaps probably, the same rich vein ex- "tended through its territory. It had not been devel- "oped so far that this could be affirmed as a fact proved. "The strip taken ran lengthwise through the claim; and "upon the trial, witnesses were permitted to testify as "to their opinion and judgment of its value. It may be "conceded that there is some element of uncertainty in "this testimony; but it is the best of which, in the nature "of things, the case was susceptible. That this mining "claim, which may be called 'only a propect' had a value "fairly demoninated a market value, may, as the Supreme "Court of Montana well said, be affirmed from the fact "that such 'prospects' are the constant subject of barter "and sale. Until there has been full exploiting of the "vein its value is not certain, and there is an element of "speculation, it must be conceded, in any estimate "thereof. And yet, uncertain and speculative as it is, "such 'prospect' has a market value; and the absence "of certainty is not a matter of which the Railroad "company can take advantage, when it seeks to enforce "a sale. Contiguous to a valuable mine, with indications "that the vein within such mine extends into this claim, "the railroad company may not plead the uncertainty in "respect to such extension as a ground for refusing to "pay the full value which it has acquired in the market "by reason of the surroundings and possibilities. In "respect to such value, the opinions of witnesses familiar "with the territory and its surroundings are competent. "At best, evidence of value is largely a matter of opinion

" especially as to real estate. True, in large cities, where " articles of personal property are subject to frequent " sales, and where market quotations are daily published, " the value of such personal property can ordinarily be " determined with accuracy; but even there, where real " estate in lots is frequently sold where prices are gen- " erally known, where the possibility of rental and other " circumstances affecting values are readily ascertain- " able, common experience discloses that witnesses the " most competent often widely differ as to the value of " any particular lot; and there is no fixed or certain " standard by which the real value can be ascertained. " The jury is compelled to reach its conclusion by com- " parison of various estimates. Much more so is this true " when the effort is to ascertain the value of real estate " in the country, where sales are few, and where the ele- " ments which enter into and determine the value are so " varied in character. And this uncertainty increases as " we go out into the newer portions of our land, where " settlements are recent and values formative and specu- " lative. Here, as elsewhere, we are driven to ask the " opinions of those having superior knowledge in respect " thereto. It is not questioned by the counsel for plain- " tiff in error that the general rule is that value may be " proved by the opinion of any witness who possesses " sufficient knowledge on the subject, but their contention " is, that the witnesses permitted to testify had no such " sufficient knowledge. It is difficult to lay down any " exact rule in respect to the amount of knowledge a " witness must possess; and the determination of this " matter rests largely in the discretion of the trial judge." (137 U. S., 352-353.)

It is submitted that there is no error in the ruling of the Court allowing the witness to testify to his opinion as to the market value of defendant's leasehold interest.

ASSIGNMENTS NUMBERED 27, 28, 29 and 30.

These assignments are on all fours with assignment number 26, except as to the qualifications of the several witnesses.

The witness Goodale (Assignment No. 27, Record 840, 657) qualified as follows: He resided at Waialua, on the Island of Oahu (being the same island upon which the land sought to be condemned is situated); was manager of the Waialua Agricultural Company and had been for a little over three years; that company had 9,000 acres planted in the District of Waialua on said island; the witness had had twenty-three years experience in the growth and manufacture of sugar in the Islands, and was familiar with agricultural lands on said island. He thought he knew the value of agricultural lands on said island; he had seen the land that the government was seeking to condemn; had been there in October, 1901; he went over the land with a party who took men along to dig holes to show the quality and depth of soil. (Record 657-658.)

It is submitted that the witness had shown qualifications sufficient in the discretion of the Court to enable him to give an opinion as to the value.

The qualifications of the witness Renton (Assignment No. 28, Record 842, 663) were as follows: He resided at Ewa Plantation, on the same island upon which the Honolulu Plantation is situated; he was a plantation manager, and had been such for about eighteen years; he had

been manager of Ewa Plantation for three years and four months; the Honolulu Plantation was situated on the east side of Pearl Lochs, and the Ewa Plantation on the west side, several miles apart,—four or five miles—possibly six miles; had been in the business of the growth and manufacture of sugar for twenty-four years; had given it all the attention he could, it was his livelihood; he knew the land that the United States was seeking to condemn by the proceedings in question, and knew where it was situated; he visited the land but could not remember the exact date, some time during the latter part of the last year; he thought he knew the value of agricultural lands about Pearl Harbor Lochs. (Record 663-664.)

It is submitted that the witness had shown sufficient qualifications to enable him to give an opinion as to the value of defendant's leasehold interest, sought to be condemned by the government.

The witness Meyer (Assignment No. 29, Record 844, 668) qualified as follows: He lived at Waianae; was manager of the Waianae Sugar Company, a sugar plantation; had been the manager for three years; had been engaged in the sugar industry for twenty-two years; had given the growth and manufacture of sugar considerable attention; knew the value of agricultural land around Ewa Basin and leasehold interests therein; knew the land that the government was seeking to condemn by this proceeding; had visited the land in October last; went down to see what the soil was like, to examine the soil; there were holes dug at intervals, and the depth of the soil was taken; he was making an inspection. (Record 667-668.)

It is submitted that the witness showed sufficient qualifications to allow of his opinion being taken.

The witness Ahrens (Assignment No. 30, Record 845, 670) qualified as follows: He resided at Waipio; was manager of the Oahu Sugar Plantation; had been manager of Oahu for five years; formerly of Waialua; had been engaged in the sugar business in the islands for nearly twenty years; had been sugar boiler, overseer and manager, had a practical knowledge of it in all branches; knew the land that the government was seeking to condemn; had visited it several times about two years ago and in October of the preceding year; knew the value of leasehold interests in and about Pearl Harbor Lochs; thought he would know the value of the leasehold interest of the land in question if its terms should be stated to him. (Record 670, 671.)

It is submitted that the witness had shown sufficient qualifications to enable him to give his opinion as to the value of the defendant's leasehold interest in the land sought to be condemned by the government and that there was no error in any of the rulings complained of.

ASSIGNMENT NUMBER 31.

(Record 847, 673.)

This assignment is based upon an objection to the following question asked by counsel for defendant of J. T. Crawley, a witness called by defendant: "What do you "know about the productive capacity of the soil of this "land?" (Referring to the land sought to be condemned.) The grounds of the objection were that the question was

"immaterial and incompetent, that it called for a mere "speculation, and was without foundation upon which "any reasonable person could base an opinion." The Supreme Court in the Monongahela case, 148 U. S., 328, answering the question, how can just compensation be determined, says: "The value of property, generally speak- "ing, is determined by its productiveness—the profit "which its use brings to the owner. Various elements "enter into this matter of value. Among them we may "notice these: Natural richness of the soil as between "two neighboring tracts—one may be fertile, the other "barren; the one so situated as to be susceptible of easy "use, the other requiring much labor and large expense "to make its fertility available."

The witness Crawley was called because he was one of the best qualified persons in the Territory to testify to the productive capacity, "the natural richness of the soil" of the land sought to be condemned. His qualifications were as follows: He was a chemist and manufacturer of fertilizer, a graduate of Harvard University; his practical experience included three years at the Louisiana Experimental Station, one year at Washington in the United States Department of Agricultural, and three years at the Hawaiian Experimental Station as Assistant Chemist and Assistant Director; and he had been three years in present position; he had seen almost all of the plantations, and had been over the greater portion of them, and had seen land of all descriptions; he knew the productive capacity of the cane land on the island; he had examined the land sought to be condemned, and knew where it was; he made what he considered a thor-

ough examination by going over it and seeing holes dug and examining the soil, and also made a chemical examination of the sub-soil, believing it would enable him to form an estimate as to its value as a cane producer. (Record 672, 673.) Thereupon the question objected to was asked, namely: "What do you know about the pro-"ductive capacity of the soil of this land?" (Meaning the land sought to be condemned.) The witness answered the question as follows: "The soil is very well adapted "to the growing of cane; it is good soil; the chemical "composition of it is good and compares favorably with "other soil in the vicinity that is raising good crops of "sugar." (Record 673.) An expert witness may base his answer to questions put to him upon his own knowledge. It is not necessary that he should detail all of the facts and circumstances that enter into the forming of his opinion. See opinion of Judge Brewer in Railroad Company v. Paul, 28 Kansas, page 821, quoted above.

It is submitted without further comment that there was no error in the ruling complained of.

ASSIGNMENT NUMBER 32.

(Record 847-678.)

Assignment number 32 is on all fours with assignments of error numbered 26, 27, 28, 29 and 30, the same hypothetical question put to the other witnesses was asked of the witness James F. Morgan, who qualified as follows: He resided in Honolulu and was an auctioneer; had resided in this country some thirty odd years; had been in business as auctioneer for himself for about sixteen or seventeen years; had been employed at same place for

nine years previous to that; his business pertained to nearly everything that comes to auctioneers, and included both real estate and merchandise; he testified that he could form an estimate of the value of real estate and leasehold interests throughout the island; he knew the value of land both in the Ewa Basin and at Pearl Harbor, where the land in question was situated; he knew the land sought to be condemned by these proceedings, and had visited it two or three months preceding said trial; he had walked and rode over it; he had studied over the matter of value of the leasehold interest of the defendant in the land sought to be condemned and had formed an estimate of that value. (Record 677-678.)

Thereupon the question objected to was asked of him.

It is submitted that he had qualified.

ASSIGNMENT NUMBER 33.

(Record 849, 680.)

This assignment is based upon an exception taken to the ruling of the Court upon an objection to the following question asked of the same witness by counsel for defendant on re-direct examination: "How many mills are there "in the vicinity of this land?" The answer was: "There "is the Honolulu Plantation Company's mill on right ad- "jacent land to this; the Oahu Mill a little further on; "then comes the Ewa and the Waialua. I cannot say "positively how far the Honolulu Mill is from this place, "but it looks to me it was within, I should say, about two "miles. I do not know how far away the Oahu Mill is." Manifestly the existence of three mills in the vicinity of this land would bear upon its value in the market, and as

the Court had intimated that that was to be the test which he would apply when he instructed the jury, it was defendant's right to show the existence of the neighboring sugar mills.

ASSIGNMENT NUMBER 34.

(Record 850, 682.)

This assignment is on all fours with assignments numbered 26 to 30 and 32. The question was put to L. A. Thurston, who had qualified as follows: He resided in Honolulu, had resided there all his life; was variously occupied, principally in the sugar business at the present time; had been interested in the sugar business for the last twenty years; had always been around and connected with people interested in the sugar business; had practical experience in the sugar plantations; was manager of the Wailuku in 1879 and 1880, and accompanied the promoters of the Ewa, the Oahu and the Waialua Plantations at the time they were investigating those lands with a view of making the plantations; had been for the last three years devoting most of his time to sugar enterprises on Maui and Hawaii, in connection with Kihei and Olaa plantations; had made a study of the question of value of cane land, and for eighteen months or two years had made a special study for the purpose of drawing up planters' contracts in connection with the plantations in which he was interested; he knew the land that was sought to be condemned by the government by these proceedings; had been down there and over the land a number of times, more recently since litigation took place, a month or so before the trial. (Record 680-682.)

It is submitted that the witness had sufficiently qualified to express an opinion.

ASSIGNMENT NUMBER 35.

(Record 851, 684.)

This assignment stands on the same footing as assignment No. 31; the witness expressed the opinion that he considered the soil on the land sought to be condemned first-rate cane land.

ASSIGNMENT NUMBERS 36 and 37.

(Record 852-3, 685.)

These assignments are covered by the discussion under assignment No. 21.

ASSIGNMENT NUMBER 38.

(Record 854, 705.)

This assignment, together with assignments numbered 39 to 45 inclusive, are taken to the alleged refusal of the Court to give instructions requested by plaintiff.

Plaintiff seems to have abandoned these assignments of error. All that is said about them in plaintiff's brief is as follows: "Instructions asked for should have been given as asked, when correctly drawn." (Plaintiff's Brief, page 184.)

Even a casual examination will disclose that the Court charged the jury strongly in favor of the plaintiff. Not only this, but it will also be found that the language used by the Court, and much of that contained in the requested instructions, the refusal to give which counsel has assigned as error, is substantially identical. See Plaintiff's requests, Record, pages 436-442. Defendant's requests, Record, pages 443-448. Charge of Court, Record, pages 421-435.

The first sentence of the request, the refusal to give which is the basis of the above assignment of error proceeds as follows: "I instruct you that private property "cannot be taken for public use without just compensa- "tion." (Record, 705.) The Court embodied in its charge the following language: "I charge you that private prop- "erty cannot be taken for public use without just com- "pensation." (Record 716.)

The second sentence of the requested instruction is as follows: "These are the words of our fundamental law, "the Federal constitution, and from them you will ob- "serve that the compensation must be just." (Record 705.) The Court charged the jury as follows: "This is the lan- "guage of our fundamental law, the Federal constitu- "tion. (Article 5 of the Amendments to the Constitution "of the United States.)" (Record 716.)

"In this behalf I charge you also that the leasehold in- "terest of the defendant, the Honolulu Plantation Com- "pany, is property and that the said defendant is enti- "tled to receive 'just compensation' for its taking." (Record 716.)

The third sentence of the requested instruction is as follows: "In this behalf I charge you that it is your duty

"to treat both sides of this case with equal fairness and "impartiality, and to avoid giving to any one side any "preference or advantage denied to the other."

The Court charged as follows: "I further charge you "that it is your duty to treat both sides with equal fair- "ness and impartiality, in arriving at a conclusion on a "question on compensation. You are not to give to any "one side preference or advantage denied to the other." (Record 716.)

The fourth sentence of the requested charge is as follows: "In other words, when dealing with this matter of "compensation, you are to remember that just compen- "sation means compensation that is just to both sides, "just in regard to the public as well as to the indi- "vidual."

The Court's charge was as follows: "And in assessing "this 'just compensation,' it is your duty to see that it "is 'just compensation,' not merely to the individual "whose property is taken, but to the public who is to pay "for it." (Record 716.)

The fifth sentence of the requested instruction was as follows: "You are not, for instance, to place an unduly "depreciative valuation upon this property because the "government desires it; nor should you place an exag- "gerated valuation upon the property either because it "is private property or because the government may "want it."

The Court charged the jury as follows: "You are not "to give to any one side preference or advantage denied "to the other. For instance, you are not to place an un- "duly depreciative valuation upon this leasehold inter-

"est because the United States wants it, nor should you "place an exaggerated valuation upon the property "because the government wants it." (Record 716.)

The sixth sentence of the instruction was as follows: "Your province is to proceed and act throughout with "even-handed fairness and impartiality, treating both "sides alike, and deciding disputed questions solely upon "the evidence received and within the lines laid down by "this charge." The Court charged the jury as follows: "And the Court reminds you that you are to be the sole "judges of the weight and truthfulness of all of the evi- "dence introduced herein, but you are to take the law "from the Court." The Court also along the same lines used the following language: "If in the course of this "trial the Court has by word or expression appeared to "favor one side or the other, it is not intended, it is the "duty of the Court and it is its aim and it should be the "duty of the jury to do absolute justice between the par- "ties in this, as well as in all other actions, and you are "simply to take the law from the Court and confine your- "selves solely to a consideration of the testimony pro- "duced in the case in arriving at a verdict without limit- "ing your consideration to any isolated portion of the "testimony, but considering it as a whole, fairly weigh- "ing all the testimony, both the direct and indirect evi- "dence with all reasonable inference to be drawn there- "from." (Record 716-717.)

It is submitted that there was no error prejudicial to the government in view of the language used by the Court in its charge in refusing to give the instruction requested by plaintiff in the very language in which plain-

tiff had requested it. It is not necessary that instructions be given in the identical language asked for by counsel if the substance thereof is covered by the charge of the Court. This has been many times decided by the Supreme Court. Ayers v. Watson, 137 U. S., 584, 600, 601.

ASSIGNMENT NUMBER 39.

(Record 855, 706.)

This assignment relates to the alleged refusal of the Court to give an instruction requested by counsel for plaintiff. The first three sentences of said requested instructions are as follows: "I instruct you that whenever "private property is taken for public use, the fair mar- "ket value of the property at the time of the taking "should be paid for it; and according to the Statute of "this Territory the actual value of the property at the "time of the summons is designated as the measure of "valuation of all property to be condemned; and I "charge you that the date of the summons in this case is "July 6th, 1901. It is to this date, therefore, that you "are to look in fixing the value of the property involved "in this case. You are to remember that the material "matter for consideration is the actual condition of the "property as it stood on that date." (Record 706.)

Thus far the Court gave the instruction word for word. (Record 718-719.) The next sentence requested was: "It "is to this that you are limited, and beyond this you can- "not go." But the Court gave the first part and dropped out the last; possibly on the ground that it was redundant. The rest of the requested instruction is as follows: "The prospective or speculative value of the land from

"possible improvements, or prospective uses, cannot be "considered by you; the value must be actual, and not "speculative or mere possible value, nor argumentative "value. It is not therefore proper to consider how the "property might be improved, or the cost of such im- "provements; nor can you consider what the probable "value of the land would be if this or that improvement "were placed upon it; nor can you consider the intention "of the lessee to make such improvements, even though "you should find any such intention to exist. In brief, you "are to limit your consideration to the actual condition "of this property as it actually stood on July 6th, 1901." (706-707.)

In regard to this part of the request we beg to call the Court's attention in the first place to the record, which will disclose that there was nothing whatever in the case to justify the use of any such language, and in the second place, the Court, in charging the jury, in addition to giving the first portion of the request, used the following language: "I have told you that the fair market value "of the property (I have not as yet but will) as that prop- "erty actually stood on July 6th, 1901, should be paid "for it; **and in this behalf I charge you that what this "property would bring at a fair public sale, where one "party wants to sell and another wants to buy may be "taken as a criterion of its market value.** But you must "understand that compensation is to be estimated in "this case by the actual legal rights acquired by the gov- "ernment and not by the use which the government may "make of those rights. * * * I further instruct you "that the actual value of this property cannot be en-

"hanced by reason of the projected improvements for "which it is taken; for this would simply be to make the "government pay for an enhancement caused by its own "work. And, moreover, the willingness or unwilling- "ness of the Honolulu Plantation Company to part with "this property is not an element of value; nor can you "consider what the Honolulu Plantation Company would "give rather than be deprived of this property. **As I have "heretofore said, you will understand in determining "compensation, limit your attention to the market value "as it actually stood on July 6, 1902, and be guided "solely by that."** * * * (Record, 717-718)

"In placing a valuation upon this leasehold interest "you cannot consider the mere speculative or possible "value of sugar that might be produced in the future on "this land. This is too remote and uncertain, and can "form no just basis for a just valuation. The amount "of sugar which it is claimed can be produced on this "land is purely speculative; as the amount of such sugar "crop would depend on many conditions such as the char- "acter and amount of fertilizer used, the amount of "water, the manner of cultivation, the depth and richness "of the soil, and many other elements which necessarily "must enter into the problem of a crop which might be "produced in any one year or series of years. But you "may consider what the land is best suited for, and the "defendant is entitled to a just compensation for its "leasehold interest in these lands for any purpose for "which it may reasonably be used; and if from the evi- "dence you shall find that the defendant had any im- "provements on that portion of the land covered by the

"leasehold interest of the defendant, and which is sought "to be condemned by the United States, which were there "prior to the 6th day of July, 1901, you are to find the "value of the user of such improvements to the defend- "ant for the remaining portion of the term of the leases, "separate and distinct from the value of the leasehold "interest itself in said lands. * * * I further in- "struct you that you are not to consider in this case the "cost of construction of the value of the sugar mill, the "pumping stations, or any of the machinery belonging "to the defendant, if said sugar mill, pumping station or "machinery were not constructed or standing upon the "561.2 acres of land sought to be condemned by the gov- "ernment at the time of this action, to-wit, July 6, 1901." (Record 719-720.)

"**You are to bear in mind that the object of this trial "is to find out what was the fair market value of the "leasehold interest of the Honolulu Plantation Company "in the 561.2 acres of land sought to be condemned by "the United States on July 6, 1901.** This may be shown "by the usual and common means adopted for such pur- "pose, and no mere speculative valuations are to be con- "sidered by you. You have the right and it is your duty "to consider all the elements of value affecting this land "and the leasehold which is sought to be condemned "therein by plaintiff; and it is also your duty to consider "that this land is not now appropriated to any valuable "use; that it is not now producing a crop. You will in "assessing the damage have a right to take into consid- "eration all the elements of a lack of value as you do all "the elements of value. **The Court further instructs you**

"**that the value of a leasehold is its actual market value** "over and above the amount of rent of the land leased "and the taxes, if the lessee has to pay the taxes." (Record 723.)

It is submitted that counsel's requested instruction was amply covered by the Court, certainly in so far as there was any evidence tending to justify the language used.

ASSIGNMENT NUMBER 40.

(Record 856-707.)

The first paragraph of Assignment No. 40 is as follows:

"Some evidence has been introduced by the govern- "ment showing certain valuations, sworn to, and filed "with the Assessor pursuant to the requirements of the "Territorial Statute in that regard. Upon this subject "I charge you that such sworn returns to the Assessor "are called by the law admissions against interest; and "you may, therefore, and indeed it is your duty to do so, "consider such sworn returns along with the other evi- "dence in the case bearing upon the question of market "value." (707.)

The Court charged the jury as follows:

"You are further instructed that unquestioned written "admissions are among the strongest testimony which "can be introduced tending to show any given state of "facts, and the Court reminds you that some evidence "has been introduced by the government tending to show "certain valuations of this leasehold interest sworn to by "the defendant through its manager, Mr. Low, before "the commencement of these proceedings, to-wit: certain

" tax returns filed with the Assessor pursuant to the laws " of the Territory of Hawaii. Such sworn returns made " by the representative of the defendant to the Assessor " are admissions against interest, and are competent evi- " dence tending to show what the defendant then be- " lieved the value of the property to be. You may there- " fore consider such returns along with the other evi- " dence in the case, upon the question of value of this " property and give it such weight as you may deem just." (Record 721-722.)

An examination of the returns referred to will disclose that they were not entitled to be considered as admissions at all. The oath was not that the valuations therein set forth were true. It was of a very special and limited nature. (Record 568-575 and Exhibits, Vol. IV of Record.) But if they were admissions as to the value of this piece of property, this leasehold interest, the plaintiff had no cause of complaint because of the language used by the Court.

The second paragraph of the instruction was as follows:

" In this connection I charge you that the government " has introduced here a certain writing of the Honolulu " Plantation Company, making an annual exhibit of its " affairs, and showing the assets of the defendant on Jan- " uary 1, 1901, I charge you that such writing and exhibit " comes within the rule just stated concerning admissions " against interest, and that it is your duty to consider " such writing and exhibit in connection with the other " evidence in the case bearing upon the question of mar- " ket value." (707.)

What the Court charged the jury was as follows:

"So also as to certain other written evidence intro-
"duced by the government tending to show the value of
"the real property of the defendant, and which includes
"the leasehold interest of the defendant in this land
"sought to be condemned. As is provided by Section
"2076 of the Civil Laws of the Territory of Hawaii. The
"defendant being a foreign corporation through its Sec-
"retary, Mr. Sheldon, about six months prior to the com-
"mencement of this suit, filed with the Treasurer of the
"Territory on or about the first day of January, 1901, that
"statement as required by the Territorial law. This
"statement is also admitted in evidence as a statement
"against interest, and you are to give to it such weight
"and significance as to you may seem proper." (722.)

It is submitted that the plaintiff was not prejudiced by the charge given as an inspection of the papers referred to will fully disclose.

ASSIGNMENT NUMBER 41.

(Record 857, 708.)

This request is in the following language:

"You have been permitted to view the premises in ques-
"tion. The object of this view was to acquaint you with
"the physical situation, condition and surroundings of
"the premises, and to enable you to better understand
"the evidence on the trial. The knowledge which you
"acquired by the view may be used by you in determin-
"ing the weight of conflicting testimony respecting value
"and damage, but no further. Your final conclusion
"must rest on the evidence here adduced." (708:)

The Court in its charge used the following language:

"Gentlemen of the jury, during the trial you visited "the lands sought to be condemned. The object of such "visit was that you might familiarize yourselves with the "nature and extent of the land and its physical char- "acteristics and conditions, so as to better enable you "to understand the evidence on the trial of the case. The "knowledge so acquired may be used by you in determin- "ing the weight of conflicting testimony respecting the "value of the leasehold interest in these lands, but not "otherwise." (Record 721.)

It is submitted that the request is covered by the charge.

ASSIGNMENT NUMBER 42.

(Record 857.)

The requested instruction was in the following language:

"In cases of this character much of the testimony con- "sists in expressions of opinion touching the subject- "matter involved. It is your province to weigh the testi- "mony of the witnesses whose opinions have been given, "by a reference to the whole situation of the property "and its surroundings, and all the attendant circum- "stances, and by applying to it your own experience and "general knowledge. The evidence of experts as to "values and damages does not differ in principle from "the evidence of experts upon other subjects. So far "from laying aside their own general knowledge and "ideas, the jury may apply that knowledge and those "ideas, to the matters of fact in evidence in determining

"the weight to be given to the opinions expressed. While "the jury cannot act in any case upon particular facts "material to its disposition resting in their private "knowledge, but should be governed by the evidence ad- "duced they may and should judge of the weight and "force of that evidence by their own general knowledge "of the subject of inquiry; and while the law permits the "opinions of those familiar with the subject to be given, "such opinions are not to be blindly received, but are to "be intelligently examined by the jury in the light of "their own general knowledge, giving them force and "control only to the extent that they are found to be "reasonable. In other words you are not bound by the "opinions of experts, but you will take their testimony "into consideration, along with all other evidence in the "case, and award to it such value as in your judgment it "deserves." (708.)

The Court charged the jury in this behalf as follows:

"Most of the evidence introduced by the defendant in "this case as to the value of these leaseholds was expert "testimony, namely the opinions of witnesses given in "answer to hypothetical questions propounded to them; "and while great weight should always be given to the "opinions honestly expressly and fairly given of those "persons familiar with the subject yet you are not bound "by such expert opinons, but they are to be intelligently "examined by you in the light of your own personal "knowledge and experience giving force and control only "to the extent that they are found to be reasonable and "in view of all the other testimony presented in the case. "And while the jury cannot in any case act under par-

"ticular facts material to its disposition, which rest "solely within their private knowledge, but should be "governed by all the evidence adduced, yet they should "judge of the weight and force of that evidence by their "own general knowledge on the subject. In a word the "jury is not bound to give weight to testimony which is "contrary to what every person of good sense and or-"dinary intelligence knows to be true." (Record 456.) (720-721.)

It is submitted the plaintiff was not prejudiced by the modification made by the Court, and that the charge as given by the Court was more favorable than that which he asked for.

ASSIGNMENT NUMBER 43.

(Record 858, 709-710.)

This request was in the following language:

"In determining upon which side the preponderance "of evidence is you are not to be controlled by the mere "number of witnesses produced, upon either side, but "you should take into consideration, the opportunities "of the several witnesses for seeing or knowing the "things about which they testified, their conduct and "demeanor while testifying, their interest or lack of in-"terest, if any, in the result of the suit, the probability or "improbability of the truth of their several statements "in view of all the other evidence adduced or circum-"stances proved on the trial, and from all the circum-"stances determine upon which side is the weight or pre-"ponderance of the evidence. In dealing with the testi-"mony you must not forget by whom it was given, the

" motive of the particular witness, if any, attributable to " him. Indeed any fact or circumstance by which his un- " biased utterance of truth might be impeded or prevent- " ed, altogether must receive your attention. Thus you " would not, as men of sense, so readily yield to the testi- " mony of a witness, whose partiality is known or observ- " able, as you would have done had the same witness been " wholly indifferent between the parties, and with no par- " tisian motive to actuate him—no interest in the result " of the trial other than the general interest which every " good citizen ought to feel, that in this, as in all other " trials, justice be done according to law."

The Court's charge to the jury, which we submit was all that plaintiff was entitled to have given and contained the substance of the generalities of the latter part of the request is as follows:

" The Court further instructs you that you are to reach " a final conclusion in this case by a preponderance of the " evidence which is not meant gentlemen, the evidence " given by the greater number of witnesses, but the " superior strength of certain evidence and the greater " weight which that evidence may in your judgment be " entitled. In weighing the testimony you should take " into consideration the opportunities of the witnesses " for seeing and knowing the things about which they " testify and especially so when testifying as experts as " to the value and also their interest or lack of interest " in the result of the action, the probability or the im- " probability of the truth of their several statements and " the reasonableness of their opinions when testifying as " experts and from all the circumstances you are to de-

"termine on which side the weight or preponderance of "the evidence rests." (722-723.)

ASSIGNMENT NUMBER 44.

(Record, 859-711.)

The request, the refusal to give which is the basis of this assignment, is in the following language:

"At arriving at a verdict in this case, you are to "give to the testimony such weight and effect as in your "judgment it deserves, but you should not treat with "such testimony arbitrarily or capriciously, nor should "you limit your consideration to any isolated or frag- "mentary part thereof. On the contrary you are to take "into consideration all the evidence in the case, both "direct and circumstantial, together with all reasonable "inference to be drawn from that evidence."

The Court covered this in different portions of the charge, we call the Court's attention to the following:

"In conclusion let me say to you that the evidence in "this case is very conflicting without commenting upon "the testimony of any witness I instruct you that in con- "sidering the testimony of all of the witnesses in this "case you may accept such portions thereof as you may "believe to be true or reject such portions thereof as "you may believe to be false, if the statements of any "one or more witnesses are so unreasonable or improba- "ble as that upon their face they do not carry conviction "of their truth to your minds, you are at liberty to reject "all or any part thereof." (725.)

ASSIGNMENT NUMBER 45.

(Record, 860, 711.)

This request was in the following language:

"In considering and deciding the facts in this case, I "charge you that the property sought to be condemned "herein is the leasehold interest of the Honolulu Planta- "tion Company in and to 561.2 acres of land and nothing "more. In passing upon the facts, you will bear this con- "stantly in mind."

The Court charged the jury in regard to this matter as follows:

"It is the value of these leasehold interests in these "561.2 acres of land that you are to estimate." (715.)

"I have told you that the fair market value of the "property as that property actually stood on July 6th, "1901, should be paid for it." (717.)

"As I have heretofore said you will understand in "determining compensation limit your attention to the "market value as it actually stood on July 6th, 1901, and "be guided solely by that." (718.)

"It is to this date therefore that you are to look in "fixing the value of the leasehold interest involved in "this case, you are to remember that the material con- "sideration is the actual condition of the leasehold inter- "est on that date. It is to this that you are limited." (719.)

"And if from the evidence you shall find that the de- "fendant had any improvements upon that portion of "the land covered by the leasehold interest of the defend- "ant and which is sought to be condemned by the "United States which was there prior to the 6th day of

"July, 1901, you are to find the value of the user of such "improvements to the defendant for the remaining por- "tion of the term of the leases, separate and distinct from "the value of the leasehold interest itself in said lands." (719.)

"I further instruct you that you are not to consider in "this case the cost of construction or the value of the "sugar mill, the pumping stations or any of the machin- "ery belonging to the defendant, if said sugar mill, "pumping station or machinery were not constructed or "standing upon the 561.2 acres of land sought to be con- "demned by the government at the time of this action, "to-wit, July 6th, 1901." (720.)

"You are to bear in mind that the object of this trial "is to find out what was the fair market value of the "leasehold interest of the Honolulu Plantation Com- "pany in the 561.2 acres of land sought to be condemned "by the United States on July 6th, 1901." (723.)

"You must therefore find for the plaintiff a verdict "condemning the leasehold interest of the defendant, the "Honolulu Plantation Company, in and to the 561.2 acres "of land, desired by the government; and you must find "a verdict in favor of the defendant for the amount of "the compensation which from all the testimony you "shall deem just." (725.)

"You may take these instructions with you when you "retire, if you wish to."

We submit that the Court made it clear to the jury that the property sought to be condemned was the leasehold interest of the Honolulu Plantation Company in and to 561.2 acres of land.

ASSIGNMENT NUMBER 46.

(Record 860-861, 729-730.)

Assignment No. 46 purports to be based upon exception No. 47, set out in the bill of exceptions. Exception No. 47 is as follows: "1. That said verdict is excessive, "in this, that it attempts to award excessive, unreasonable and inconsistent compensation. 2. That said verdict is contrary to and against the law and the evidence "herein. 3. That said verdict is not sustained or justified by either the law or the evidence herein, and that "said evidence is insufficient to justify said verdict. 4. "That said verdict is contrary to and against the charge "of the Court herein." (Record, page 729-730.)

The alleged grounds of the exception set forth in the *assignment of errors* are simply a repetiton of the grounds set forth in the motion for a new trial, and an attempt to obtain a review of the decision of the lower Court on motion for a new trial in this Court indirectly when counsel has found that he cannot do so directly.

The exception cannot be considered under the rulings of the Supreme Court and the Circuit Courts of Appeal.

Such a re-examination of the verdict of a jury was unknown to the rules of the common law, and is expressly forbidden by the Seventh Article of the Amendments to the Constitution of the United States.

This has been the settled law ever since the decision in Parsons v. Bedford, 3 Peters, 447, 448, where the following is contained: "The only modes known to the common "law to re-examine such facts was the granting of a new "trial by the Court where the issue was tried, or the "award of a venire facias de novo, by the appellate

"Court, for some error of law that had intervened in the "proceedings."

See also The Justices v. Murray, 9 Wall., 278.

The latter case is authority also for the proposition that the latter part of the amendment and the prior part are separable, and that the provision to the effect that no fact tried by a jury shall be re-tried is a substantial and independent clause and a prohibition to the courts of the United States against re-examining any fact tried by a jury in any other manner.

It is immaterial whether we were entitled under the Constitution to a jury in this cause or not, the fact of compensation having been tried and determined by a jury is not reviewable in this Court except for error in the record.

The authorities sustaining the proposition quoted from the above will be found fully set out under the respective case in Rose's Notes.

See Volume 3, page 86.

See Volume 7, page 175.

The two cases are quoted with approval and the principle therein applied to a verdict entered by a jury in a condemnation suit in the State Court of Illinois, and it was held that the fact that the Federal Constitution does not require the determination of the question of compensation by a jury does not in any way effect the application of the latter clause of the seventh amendment, namely, that an issue of fact so tried might not be otherwise re-examined than according to the course of the common law, which was as there stated either by a new

trial granted by the trial court or an award of a venire facias de novo by an appellate court for some error of law intervening in the record.

See Chicago, Burlington, etc., Road v. Chicago, 166 U. S., 242, 243-246.

This is an opinion of the Supreme Court on a writ of error sued out to review the record in a condemnation suit instituted by the City of Chicago against the Chicago, Burlington & Quincy Railroad Co.

The Court through Mr. Justice Harlan uses the following language, which will be found at page 242:

" Whatever may have been the power of the trial court " to set aside the verdict as not awarding just compensa- " tion, or the authority of the Supreme Court of Illinois, " under the constitution and laws of that State, to review " the facts, can this Court go behind the final judgment of " the State Court for the purpose of re-examining and " weighing the evidence, and of determining whether " upon the facts, the jury erred in not returning a verdict " in favor of the railroad company for a larger sum than " one dollar? This question may be considered in two " aspects: First, with reference to the seventh amend- " ment of the constitution providing that ' in suits at com- " ' mon law, where the value in controversy shall exceed " ' twenty dollars, the right of trial by jury shall be pre- " ' served, and no fact tried by a jury shall be other- " ' wise re-examined in a Court of the United States " ' than according to the rules of the common law'; sec- " ond, with reference to the statute (Rev. Stat., sec. 709) " which provides that the final judgment of the highest

"court of a State in certain named classes may be re-ex-
"amined in this Court upon writ of error."

We would here call the Court's attention, by way of parenthesis, to Luxton v. North River Bridge Co., 147 U. S., 337, holding that the action of the Circuit Court in condemnation proceedings, as in other cases on the common law side of the Court was reviewable by the Supreme Court *only by writ of error.* Indeed, it is by writ of error that the plaintiff brings the record of the Court below before this Court for review.

Again referring to the opinion in Chicago Railroad Co. v. Chicago we would call the Court's attention to the following:

**"One of the objections made to the acceptance of the "constitution as it came from the hands of the conven-
"tion of 1787 was that it did not, in express words, pre-
"serve the right of trial by jury, and that, under it, facts
"tried by a jury could be re-examined otherwise than
"according to the rules of the common law. The sev-
"enth amendment was intended to meet these objections
"and deprive the courts of the United States of any such
"authority."**

After referring to Justices v. Murray, 9 Wall., 274-278, and pointing out that it was there held that Congress could not authorize a re-trial of facts in a case tried by a jury the court continues:

"Upon the reasoning in the case just referred to, it
"would seem to be clear that the last clause of the sev-
"enth amendment forbids the retrial by this Court of
"the facts tried by the jury in the present case.

"This conclusion is not affected by the circumstance
"that this proceeding is to be referred to the State's

"power of eminent domain, in which class of cases it has "been held that, in the absence of express constitutional "provisions on the subject, the owner of private prop- "erty taken for public use cannot claim, as of right, that "his compensation shall be ascertained by a common law "jury. * * *

"The persons impanelled in this case to ascertain the "just compensation due the railroad company consti- "tuted a jury as ordained by the constitution of Illinois "in cases of the condemnation of private property for "public use, and, being a jury within the meaning of the "seventh amendment of the Constitution of the United "States, the facts tried by it cannot be retried 'in any "'Court of the United States otherwise than according "'to the rules of the common law.' The only modes "known to the common law 'to re-examine such facts "'are the granting of a new trial by the Court where the "'issue was tried, or to which the record was properly "'returnable, or the award of a venire facias de novo by "'an Appellate Court, for some error of law which inter- "'vened in the proceedings.' Parsons v. Bedford, 3 Pet. "433, 447, 448; Railroad Company v. Fraloff, 100 U. S., "24, 31."

"To this," the opinion continues, "may be added that "Congress has provided that the final judgment of the "highest court of a State in cases of which this Court "may take cognizance shall be re-examined upon writ of "error, a process of common-law origin, which removes "nothing for re-examination but questions of law arising "upon the record. Egan v. Hart, 165 U. S., 188. Even "if we were of opinion, in view of the evidence, that the

"jury erred in finding that no property right of a sub-
"stantial value in money, had been taken from the rail-
"road company, by reason of the opening of street across
"its right of way, we cannot, on that ground, re-exam-
"ine the final judgment of the State Court. We are per-
"mitted only to inquire whether the trial court pre-
"scribed any rule of law for the guidance of the jury that
"was in absolute disregard of the company's right to just
"compensation." 166 U. S., 243-246.

As already pointed out, the proceedings had in the Court below come before this court upon writ of error, and are governed by the rule of law applicable to that writ.

THE SO-CALLED EXCEPTIONS NUMBERS 1 AND 48.

These so-called exceptions ought not to be considered by the Court because there is no law or practice justifying the manner of their presentation. The manner of presentation is not according to the course of the common law. The Court therefore cannot rightly take any notice of them. The only way that a fact tried by a jury can be re-examined upon a writ of error in a Court of the United States is for errors of the Court based upon exceptions taken in the Court below and duly placed upon the record by the allowance of a bill of exceptions by the judge who tried the cause.

The leading case is Pomeroy's Lessees v. The State Bank of Indiana, 1 Wall., 592, 597-604. The syllabus is as follows:

"No exception lies to overruling a motion for a new trial, nor for entering judgment."

"The entries on a judge's minutes, the memoranda of "an exception taken, are not themselves bills of excep- "tions, but are only evidences of the parties right sea- "sonable to demand a bill of exceptions. No exception "not reduced to writing and sealed by the judge is a bill "of exceptions, and within the rules and practice of the "Federal Courts."

"Where an objection is to the ruling of the Court, it "is indispensable that the ruling should be stated, and "that it should also be alleged that the party then and "there excepted."

In that case, as in this, counsel resorted to the minutes but the Court disposed of the minutes with the following observation:

"He insists that he did so, because it is so stated in "the minutes of the case as appears in the transcript, "but the insuperable difficulty in supporting that propo- "sition is, that nothing of the kind appears in the bill of "exceptions." 1 Wall., 598.

At page 603 the Court says:

"Having come to the conclusion that the paper in the "transcript is not a good bill of exceptions, agreed state- "ment of facts, or a special verdict, the result is that it is "not a part of the record and must be wholly disre- "garded by the Court in determining whether the judg- "ment of the Court below ought to be reversed or "affirmed." 1 Wall., 603.

See also, Balt. R. R. Co. v. Trustees, 91 U. S., 130-131.

The Court in the latter case observes:

"Sufficient has already been remarked to show that "the affidavits constituting the whole basis of the theory "of fact involved in the errors assigned, effecting the "merits of the controversy, are no part of the record; "and consequently the errors assigned are entirely des- "titute of any legal foundation." 91 U. S., 131.

But if the alleged exceptions can be considered there is no error in the rulings.

We were entitled to a jury not because of any provision in the constitution restraining Congress from denying us the right to one, but because the Supreme Court has held that we were entitled to a jury in construing the very Statute that this proceeding was instituted under, viz., the act of August 1st, 1888; c. 728. (25 Stat. 357.) (See the reference thereto in the charge of the Court, Record 712.)

Chappell v. United States, 160 U. S., 499-513.

The opinion states the law as follows:

"**The general rule, as expressed in the Revised Stat- "utes of the United States, is that the trial of issues of "fact in actions at law, both in the District Court, and "in the Circuit Court, 'Shall be by jury,' by which is evi- "dently meant a trial by an ordinary jury at the bar of "the Court.** (Revised Statutes, secs. 566, 648.) Congress "has not itself provided any particular mode of trial in "proceedings for the condemnation of lands for public "uses. The direction in the act of 1889, c. 728, sec. 2, that "such proceedings shall conform, 'as near as may be to "those in the courts of record in the States,' is not to

"be construed as creating an exception to the general "rule of trial by an ordinary jury in a Court of record, "and as requiring, by way either of preliminary, or of "substitute, a trial by a different jury, not in a Court of "record, nor in the presence of any judge. Such a con- "struction would unnecessarily and unwisely encumber "the administration of justice in the Courts of the "United States. (Indianapolis and St. Louis Railroad v. "Horst, 93 U. S., 291, 301; Southern Pacific Co. v. Den- "ton, 146 U. S., 202, 209; Mexican Central Railway v. "Pinkney, 149 U. S., 206, 207.) This plaintiff in error had "the benefit of a trial by an ordinary jury at the bar of "the District Court on the question of the damages sus- "tained by him; and he was not entitled to a second trial "by jury, except at the discretion of that Court, or upon "a reversal of its judgment for error in law."

Not only is this so but an examination of the Civil Laws of the Hawaiian Islands, 1897, Chapter 99, which was also referred to frequently by the Court and counsel for plaintiff in the Court below, and relied on here, will show that it was intended by the local law that the issue of compensation should be tried as an ordinary action at law.

It is provided (page 595) that,

"the *Circuit Courts* shall have power to try and determine "all *actions* arising under this act, subject only to an ap- "peal to the Supreme Court in accordance with law."

There is nothing further upon the subject of how the compensation shall be determined. On page 596 it is provided that "the Court shall determine all adverse or con- "flicting claims to the property sought to be condemned

" and to the compensation or damages to be awarded for " the taking of the same."

The last section provides that, " where not expressly " provided in this act, the procedure shall be the same as " in other civil actions."

The chapter on civil procedure in courts of record provides first for the commencement of civil actions by petition.

Ballou's Civil Laws, Section 1215, page 483.

Section 1223 found on page 486 of said " Civil Laws " provides for the appearance of defendant and two forms of pleading by him; the first being in the nature of a demurrer and forming " an *issue of law* to be determined *by the Court* ",—the other forming " an *issue of fact* to be determined *by the jury.*"

There can be no doubt on an examination of the local laws that it was contemplated that a jury should pass on the question of compensation. The idea of jury trial will be found an inherent feature of all proceedings in the *Circuit Courts.* All other proceedings are before Circuit *Judges* at Chambers.

See page 457 of the chapter on *Circuit Courts and Circuit Judges,* and particularly Section 1144 defining the jurisdiction of Circuit *Courts* and Section 1145 defining the jurisdiction of Circuit *Judges.* Ballou's Civil Laws, 1897, pages 467, 458.

THE MOTION FOR A NEW TRIAL.

As to the so-called exception No. 48, it is clear that if the Court did not altogether refuse to exercise its dis-

cretion the decision cannot be ~~reversed~~ reviewed. It has been so often so held that the Supreme Court now manifests impatience when the point is referred to. But counsel says he relies on the authority of Felton v. Spiro, 78 Fed., 576, where a cause was sent back to a trial court to exercise its discretion where the judge *expressly* refused to do so and expressed the opinion that he would be "very glad indeed" when the Circuit Court of Appeals for that Circuit should have occasion to pass judgment upon the question of the *power* of the trial court to set aside a verdict because it was in the judgment of the Court against the weight of the evidence. 78 Fed., 580-581.

Now it will be presumed that Judge Estee had Spiro v. Felton called to his attention. Counsel says, in his affidavit, that he embodied it in his supplemental bill of exceptions, but even if he did not it is perfectly clear that Judge Estee was in full accord with the view that the Circuit Court of Appeals of the Sixth Circuit took of the matter.

Note his language:

"And while *it seems to be well settled* that under the law, "the Court *can* again set the verdict aside and grant a "new trial upon the same terms as in the former trial "*if in its discretion* it *sees fit*, to do so, yet the consensus of "the best judgment of the courts as found in the deci- "sions is, that where no rule of law has been violat- "ed, the Court *will* not, after two concurring verdicts, "grant a new trial if the questions to be tried depend "wholly on matters of fact; although the verdict is, in "the judgment of the Court, against the weight of the "evidence. (Joyce v. Charleston Ice Manufacturing Co.,

"50 Fed., 371-5; Clark v. Barney Dumping Co., 109 Fed., "235.)" (Record 774-775.)

It is respectfully submitted that there is no error in the record and that the government had the full benefit of every legal proposition in any way bearing upon the case.

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